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No.

IN THE

Supreme Court of the United States

JAMES BUTTS, RAY COOPER, SHANE TALBOT, RAYMOND BENNETT AND MICHAEL CROSBY,
Petitioners,

vs.

JAMES McNALLY AND JAMES JOHNSON BEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a convicted killer has a civil remedy under 42 USC § 1983 against a police detective who deliberately continued to question him after a *Miranda* invocation and who said that subsequent statements could not be used against him in court or whether the remedy is exclusion of the evidence at the criminal trial.

Whether the police can violate the Fifth Amendment during custodial interrogations or whether a Fifth Amendment violation can only be complete at trial with the improper admission of evidence.

Whether a reasonable officer, trained by state-sanctioned sources that it was lawful to deliberately continue questioning a suspect after a *Miranda* invocation and that exclusion of evidence at trial is the remedy for a *Miranda* violation, would know that deliberately continuing to question violates the Fifth Amendment and exposes the officer to civil liability under 42 U.S.C. § 1983, or whether such officer is entitled to qualified immunity from suit.

PARTIES TO PROCEEDING

The parties to this consolidated proceeding are: Petitioners Santa Monica Police Chief James T. Butts, Jr., Santa Monica detectives Shane Talbot and Ray Cooper; Los Angeles detectives Raymond Bennett and Michael Crosby; and Respondents James McNally and James Johnson Bey.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Shane Talbot, Ray H. Cooper, James T. Butts, Raymond Bennett and Michael Crosby respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit denying petitioners' qualified immunity.

OPINIONS AND ORDERS BELOW

The Ninth Circuit Court of Appeal's opinion affirming the denial of petitioners' summary judgment motion based on qualified immunity was filed on November 8, 1999. (Appendix A-31) The Ninth Circuit denied rehearing and rehearing *en banc* and amended the opinion on January 8, 2000. (Appendix A-1) The corrected opinion is reported at 195 F.3d 1039 (9th Cir. 1999).

The district court's decision denying petitioners' motion to dismiss on the merits and denying qualified immunity is reported at 922 F. Supp. 327 (C.D. Cal. 1996). The district court's Order Re: Cross Motions For Summary Judgment appears at Appendix B-1. The district court's Order Granting Defendants' Motion for Summary Adjudication; Denying Plaintiffs' Motion For Certification for Interlocutory Appeal; and Granting Defendants' Request For Stay Pending Appeal On Qualified Immunity Issue appears at Appendix C-1.

JURISDICTION OF THIS COURT

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States. This Petition is timely filed within ninety days of the Ninth Circuit's denial of petitioners' request for rehearing. *See* Order and Amended Opinion. (Appendix A-1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision at issue in this appeal is the Fifth Amendment to the Constitution of the United States which provides in pertinent part: "No person...shall be compelled in any criminal case to be a witness against himself..."

The statutory provision at issue in this appeal is 42 USC § 1983 which provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...."

STATEMENT OF THE CASE

A. The Proceedings Below.

While serving their prison terms, respondents James McNally and James Bey, along with two associations of defense counsel, filed suit against the petitioners and their employers, the Cities of Santa Monica and Los Angeles, in federal district court pursuant to 42 U.S.C. § 1983. Respondents sought declaratory and injunctive relief and money damages, alleging that they were deprived of their Fifth, Sixth and Fourteenth Amendment rights because petitioners deliberately continued to question them, told them that any statements could not be used against them, and obtained incriminating statements from them after they invoked their *Miranda* rights.

Petitioners moved to dismiss the action and, among other grounds, asserted that they were entitled to qualified immunity, because the questioning -- done in accordance with California sanctioned training -- did not violate clearly established constitutional rights of which reasonable police officers would have known.

The District Court dismissed the associations, concluding that they lacked standing, but denied petitioners' qualified immunity defense. In a particularly extreme footnote to its published opinion, the district court likened the petitioners' argument that they relied on their training to Lieutenant Calle's

defense in the infamous massacre at My Lai. *California Attorneys for Criminal Justice v. Butts*, 922 F.Supp. 327 (C.D. Cal. 1996). Despite doing so, the district court invited petitioners to move for summary judgment.

In petitioners' motion for summary judgment, they presented extensive evidence that they had received state-certified training that questioning after an invocation does not violate the Fifth Amendment. The district court granted the motion in part, ruling that the interrogations did not "shock the conscience" or otherwise establish a claim under the Fourteenth Amendment. The court, however, ruled that respondents could proceed on their Fifth Amendment claim, and thereby denied the officers' defense of qualified immunity, and certified the qualified immunity issue for appeal. (Appendix B-1 and C-1)

On appeal, the Ninth Circuit affirmed the district court's denial of qualified immunity. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999). In doing so, the appellate court reiterated and expanded its holding in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (*en banc*), that the Fifth Amendment can be violated at the station house independent of the introduction of evidence at trial, suggested that deliberately questioning after a *Miranda* invocation violates the Fifth Amendment, and stated that the officers should have ignored any training to the contrary. Petitioners moved for

reconsideration or *en banc* review and asked the Ninth Circuit to correct certain mischaracterizations about the interrogations. The Ninth Circuit denied both reconsideration and review but made some of the requested corrections.

B. California's System Of Police Training.

California law establishes a Commission on Peace Officer Standards and Training (POST), as part of the state's Department of Justice, to regulate the training of California's police officers. California Penal Code §§ 13500 *et seq.* POST, in turn, promulgates minimum standards for training peace officers and certifies local training programs. Police Departments throughout the state rely on POST-certified training courses and legal source materials provided by the California Attorney General's Office.

Each of the petitioners in this case received POST-certified training in interrogation techniques. Like officers in most smaller cities, the Santa Monica detectives received such training directly from the state-sponsored programs. Stipulation at Appendix D-1 and G-1. The Los Angeles detectives received their pertinent training through POST-certified, in-house programs, as is typical for larger departments. Specifically, each of the petitioners was trained that a custodial suspect could be lawfully questioned after a *Miranda* invocation. Stipulation at Appendix D-1;

Declarations of Carey, Hill and Talbot at Appendix E-1 through G-1. The detectives relied upon that training in questioning respondents about the brutal killings they were investigating and which underlie this civil case.

C. Bey's Crime and His Interrogation.

On March 6, 1991, LAPD detectives Raymond Bennett and Michael Crosby began their investigation of the murder of 23 year old Michelle Smith. Michelle had been found dead in a trash dumpster wrapped in a blanket and bound with rope. Her throat had been slashed and the back and side of her head had suffered blunt force. As a result of physical evidence found at the scene and witness statements that incriminated James Bey, detectives Bennett and Crosby obtained a warrant to arrest Bey and search his apartment. Significant evidence to incriminate Bey was recovered during the search of his apartment. Armed with this information, Bennett and Crosby returned to the police station to interview Bey.

Bey's 15-minute interrogation was conducted by Bennett and Crosby in the early evening and was tape recorded. Bey was not handcuffed or restrained in any way during the interview and the detectives kept a respectful distance from him while asking him questions. The tape recording establishes that Bennett recited the *Miranda* admonition in a serious and professional manner and that the interview was

conducted in a conversational tone. There is no indication that Bey was physically uncomfortable or emotionally upset.

After confirming that he was a murder suspect, Bey invoked his right to silence and his right to an attorney. The detectives explicitly acknowledged Bey's invocation. Bennett informed Bey that any subsequent statements could not be used in court because he hadn't waived his rights. Bennett continued to question Bey after his invocation to obtain statements that could be used to impeach him if he chose to take the witness stand and lie. Bey was extremely talkative and willingly gave the detectives his account of the events on the night of the murder.

The detectives had received POST-certified training that noncoercive questioning of a suspect after an invocation of *Miranda* rights was constitutionally permissible, and that any voluntary statements obtained during such questioning could be used for impeachment. The LAPD detectives' questioning of Bey was consistent with a Ninth Circuit panel decision issued just one month earlier holding that "a continued interrogation after a defendant invokes his *Miranda* right to counsel does not violate the Fifth Amendment" and that "a violation of *Miranda* rights is not itself a violation of the constitution." *Cooper v. Dupnick*, 924 F.2d 1520, 1527-28 (9th Cir. 1991). Training materials issued the same month, citing the *Cooper* panel decision, so informed officers and added that such questioning

would not create civil liability. *See California Attorneys for Criminal Justice*, 195 F.3d at 1051-52 (dissent).

Before Bey testified at his murder trial, the judge ruled that the statements he made during the post-invocation questioning were voluntary and admissible to impeach his credibility if he testified. Bey testified, was impeached with the statements he had made to Bennett, and was convicted of murder. Bey appealed his conviction based upon the admission of the statements, but the California Court of Appeals held that the admission of Bey's statements was harmless error in light of the overwhelming evidence of his guilt. *People v. Bey*, 21 Cal.App.4th 1623 (1993).

D. McNally's Crime And His Interrogation.

On March 1, 1993, Santa Monica police found James Jones lying naked, bloodied and dead on his own bed, having been stabbed at least 16 times.

Detective Shane Talbot investigated the scene and concluded that while the violence of the crime was clear, the killer's state of mind was not. Talbot Declaration at Appendix G-1. The presence of a bloody kitchen knife, blood spattered around the bed, an adult video in the VCR, the presence of semen and body hairs on the victims bedding which were not his, and the absence of a struggle all suggested that the crime had been committed

by surprise and in the heat of passion. Because the apartment was ransacked, the victim's car was missing, and neighbors had earlier seen the victim with two male strangers, the evidence suggested that the killing might have been part of a pre-meditated burglary involving multiple suspects.

The next day, Talbot and Sgt. Ray Cooper flew to Arizona to interview James McNally who had been arrested there driving Jones' car. McNally had already confessed to Arizona police that he killed Jones, but he claimed self defense.

The detectives interviewed McNally for about 75 minutes, seated at a table in a "day room". McNally was neither handcuffed nor restrained. During the tape-recorded interview, Talbot recited the *Miranda* admonition and both detectives questioned McNally in a conversational tone, never raising their voices, and never receiving any indication from McNally that he was physically or emotionally uncomfortable. Talbot Declaration Appendix G-1.

McNally waived his *Miranda* rights and told a story of killing Jones in self defense. He said that he was a transient fleeing a Pennsylvania warrant, that Jones offered him a place to sleep, and that, as he came out of the bathroom in Jones' apartment, Jones suddenly assaulted him with a knife demanding sex. McNally claimed that in fending Jones off, he stabbed him to death. The detectives told McNally that this story was inconsistent with the evidence. Thereafter,

McNally invoked his right to counsel.

In response, Talbot and Cooper did not stop questioning, which was unusual. Although each detective had conducted dozens of interrogations, they continued to question after *Miranda* invocations in very, very few cases. However, they were trained that they could continue questioning, if necessary, without violating the suspect's Fifth Amendment rights. In order to find out whether McNally killed Jones in the heat of passion or as part of a pre-meditated residential burglary - they continued to question Jones. The distinction was important to determine whether or not Jones could be charged with murder or some lesser offense. The detectives also wanted to make sure there were no accomplices and to locate Jones' stolen property.

Talbot and Cooper explicitly acknowledged McNally's invocation and noted its consequences. Talbot told McNally that because he had invoked his rights, subsequent statements could not be used against him, and Cooper added that they could not be used in the case in chief. McNally said he would talk to them again after talking to a lawyer. In response, Talbot made a disparaging and unprofessional remark about McNally's lawyer and said he would not believe anything McNally said after talking to a lawyer. The interview tape gives no indication that this remark, which was made in a conversational tone, upset McNally. After a brief exchange, McNally resumed answering questions.

This time, McNally told the detectives an entirely different story. He said that he and Jones had consensual sex and that Jones irritated him by asking for more sex. McNally then went to the kitchen, got a knife, and returned to bed with the knife hidden. The next time Jones touched him, McNally rolled over and stabbed Jones to death. McNally then ransacked Jones' apartment and fled the state, pausing only to sell some of Jones' belongings. The detectives believed McNally's confession was truthful and squared with the evidence they found at the crime scene.

McNally was charged in California with murder. Based upon his confession, which showed that the killing was not part of a pre-meditated burglary, the prosecutor did not seek the death penalty. McNally represented himself at trial. His confession of murder was not used against him because the trial judge excluded it for all purposes. McNally took the stand and told the jury his story of self-defense. The jury apparently believed him; they convicted him of manslaughter.

REASONS FOR GRANTING THE PETITION

This case meets every criteria established by this Court in Rule 10 for concluding that a case merits review on certiorari. As a matter of law, the Ninth Circuit's decision conflicts both directly and in principle with decisions of both this Court and of the other federal appellate courts. It also conflicts with a decision of the California Supreme Court.

Most important, the Ninth Circuit's decision destroys the balances fundamental to our criminal justice system and to law enforcement. In its post-*Miranda* cases, this Court has weighed society's need to do justice based upon the truth, against the need to protect the individual rights of criminal defendants; and has struck a balance which effectuates our fundamental democratic goal of protecting both one and all. In its qualified immunity decisions, this Court has weighed our common need for peace and safety against individual needs to be free from police abuse. In both lines of cases, this Court has successfully fashioned a balance which harmonizes these needs and goals. The Ninth Circuit has destroyed that balance, and only this Court can restore it.

Moreover, effective restoration can only occur in this case. This Court's upcoming decision in *Dickerson v. United States*, Docket No. 99-5525, in which the Court has granted certiorari to determine whether 18 USC § 3501 is a constitutional enactment or an improper Congressional attempt to legislatively overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), may lay to rest claims that violating the *Miranda* procedures violates the Constitution. However, *Dickerson* will likely not resolve the question of whether the Fifth Amendment may be violated solely by conduct occurring during an interrogation, and certainly will not resolve the question of whether qualified immunity shields officers who rely on their certified training.

I. The Ninth Circuit's Decision Conflicts With This Court's Holding That The Fifth Amendment Is A Trial Right And Conflicts In Principle With The Balance This Court Has Struck Between Society's Needs For Just Law Enforcement And Individual Rights.

A. The Ninth Circuit Ignored This Court's Holding That The Fifth Amendment Can Only Be Violated At Trial.

This Court has clearly and consistently stated that the Fifth Amendment right against self-incrimination is a *trial* right. *See Malloy v. Hogan*, 378 U.S. 1 (1964) and *Withrow v. Williams*, 507 U.S. 680, 691 (1993). "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

Apparently more concerned with controlling the police than with following controlling precedent, the Ninth Circuit jumped the track in *Cooper v. Dupnik* by holding that a Fifth Amendment violation may occur even when a statement taken in violation of the *Miranda* procedures is never used in a criminal proceeding.

Cooper, 963 F.2d at 1238-45. Reasoning to reach its desired result in *Cooper*, the Ninth Circuit emphasized the dangers inherent in custodial interrogation and simply asserted, without supporting authority, that a Fifth Amendment violation occurred at the station house in that case because certain of Cooper's statements "could have been used against him."

The Ninth Circuit's Fifth Amendment holding in *Cooper* conflicted with this Court's precedent when the decision issued. However, the result in that case was correct because the interrogation was admittedly unconstitutional. The officers testified, in deposition, that they intentionally formulated a plan to violate the constitutional rights of the first suspect arrested with the goal of evulsing a confession. They also testified that, during the interrogation, they knew they were violating Cooper's constitutional rights. Their conduct clearly "shocked the conscience," thereby violating the Fourteenth Amendment. Moreover, the Ninth Circuit's decision noted that mere benign questioning after a *Miranda* invocation did not violate the Fifth Amendment. Thus, the decision created considerable ambiguity about what type of questioning is constitutionally permissible after a Miranda invocation.

After *Cooper* was decided, this Court clarified that the scope of the Fifth Amendment does not extend outside the courthouse even for the salutary purpose of maximizing protection of personal privacy. *See United States v. Balsys*, 524

U.S. 666 (1998). The *Balsys* decision should have stopped the Ninth Circuit in the pending case from proceeding down the road it had explored in *Cooper*. However, it did not. The decision in this case, and its decision in *Henry v. Kernan, 177 F.3d 1152 (9th Cir. 1999)*, eliminate any ambiguity in the Ninth Circuit's position: the Ninth Circuit holds that the Fifth Amendment may be violated in an interrogation independent of whether the self-incriminating statements are ultimately used at trial. Thus, despite the admonition in *Balsys*, the Ninth Circuit has compounded its own error and careened even further afield from the boundaries of this Court's Fifth Amendment precedent. In doing so, it has elevated the *Miranda* procedures to the level of constitutional rights in clear contradiction of this Court's repeated and explicit admonitions to the contrary. *See Michigan v. Tucker,* 417 U.S. 433, 446 (1974); *New York v. Quarles,* 467 U.S. 649, 654 (1984); *Moran v. Burbine,* 475 U.S. 412, 424-25 (1986).

This transmutation of the *Miranda* procedures into constitutional rights also conflicts with the numerous decisions of this Court and other courts, including the Ninth Circuit, approving the admissibility of derivative evidence obtained without *Miranda* compliance -- recognizing that constitutional rights have not been violated when *Miranda* procedures were not followed. *See e.g. Michigan v. Tucker,* 417 U.S. at 433; *Oregon v. Elstad,* 470 U.S. 298; *United States v. Polanco,* 93 F.3d 555 (9th Cir. 1996); *United States v. Morales,* 788 F.2d 883 (2d Cir. 1986).

B. The Ninth Circuit's Decision Also Overlooks This Court's Decisions Which Strike A Balance Between Society's Needs, With Suspects' Individual Rights.

1. The Ninth Circuit Has Ignored This Court's Well-Established Qualified Immunity Doctrine.

The qualified immunity doctrine protects all of us by ensuring that police officers will not shirk their difficult duties from fear of personal liability. *See Hunter v. Bryant*, 502 U.S. 224 (1991). Because our society needs peace and safety, this Court requires that the doctrine be interpreted broadly. Thus, it shields police officers from individual liability for civil rights violations unless they "violate clearly established statutory or constitutional rights..." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 299 (1991). It ensures that, before a police officer will be held individually liable for his or her work, the officer must be afforded clear and fair warning that the conduct violated constitutional rights. *United States v. Lanier*, 520 U.S. 259 (1997).

The Ninth Circuit's decision conflicts with this Court's mandate that the protections afforded

by the qualified immunity doctrine shall be broadly interpreted for the ultimate good of us all. In denying the individual officers' qualified immunity claim, the Ninth Circuit concluded, in effect, that a reasonable officer would know: (1) that intentionally continuing to question after a *Miranda* invocation, in a manner which does not shock the conscience, violates a suspect's Fifth Amendment rights independent of the admission of self-incriminating statements at trial; and (2) that any training to the contrary should be ignored. The first conclusion is legally unsupportable because it conflicts with this Court's precedent. The second is very dangerous.

Our well-being as a society requires police to follow their training; not ignore it. They must conform their work to legal standards communicated to them through state-approved training, and they must be held accountable when they do not. The consequences of sending police the message that each officer should form individual judgments as to the law are predictable and frightening. The best of them will be torn apart by the stress of taking individual responsibility for making legal assessments beyond their expertise in a job which requires split-second decisions. The average will hesitate to enforce the law, taking the safe, but ineffectual course of protecting themselves rather than the public. The worst will become vigilantes.

In this case, the record clearly establishes that interrogation training certified by the State of

California instructed detectives that deliberately continuing to question after a *Miranda* invocation was not, in itself, unconstitutional. The officers who are petitioning this court depended upon that training. They must be shielded by it if we, as a society, expect them to follow it.

The Ninth Circuit indicated that the Fifth Amendment violation in this case consisted not only of petitioners' continued questioning after respondents' *Miranda* invocations but also of the detectives' representation that post-invocation statements could not be used against respondents. The Ninth Circuit said this was deceptive and illegal; in fact, it was neither. In McNally's murder trial, his post-invocation statements were excluded for all purposes. Thus, the detectives' statements were, in fact, true and amounted to a grant of de facto use immunity. *See Kastigar v. United States,* 406 U.S. 441 (1972). In Bey's trial, the post-*Miranda* statements were admitted for impeachment but were held to be harmless error. Thus, even if the detectives' statements were misleading, they were inconsequential. In any event, the appropriate remedy was a criminal appeal. *See Heck v. Humphrey,* 512 U.S. 477 (1994). Thus, the detectives' statements were not a sufficient bases to expose them to civil liability, by denying qualified immunity.

The denial of qualified immunity to the Los Angeles detectives is particularly egregious. Not only were the officers not "afforded clear and fair

warning that their conduct violated constitutional rights," they were entitled to rely upon the panel decision in *Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991), issued one month before the Bey interrogation. The *Cooper* panel, which reviewed a very aggressive interrogation, held that "continued interrogation after a defendant invokes his *Miranda* right to counsel does not violate the Fifth Amendment" (*Id.* at 1528) and that "a violation of *Miranda* rights is not itself a violation of the constitution." *Id.* at 1527. Training materials issued the same month as Bey's interrogation, citing the *Cooper* panel decision, informed officers that continuing interrogation after a *Miranda* invocation did not create civil liability. Additionally, the *Cooper* panel decision was consistent with both this Court's precedents and Ninth Circuit law as it existed in 1991. The dissent in this case recognized that detectives Bennett and Crosby are entitled to qualified immunity because, in 1991, it was *not* clearly established law that their conduct -- continuing the interrogation despite Bey's invocation of his *Miranda* rights, stating they could not use his statements in court, and claiming they possessed incriminating evidence -- violated the Fifth Amendment. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1051-52 (9th Cir. 1999).

2. The Ninth Circuit Impermissibly Transmutes *Miranda* Into A License To Commit Perjury.

In its line of decisions clarifying the scope of the *Miranda* holding, this Court has protected the efficacy of the criminal justice system by establishing that, although statements taken in violation of the *Miranda* procedures may not be used to prove guilt, they may be used for impeachment. In *Harris v. New York*, 401 U.S. 222 (1971), this Court held that a statement taken without proper *Miranda* advisements may be admitted for impeachment purposes. In *Oregon v. Haas*, 420 U.S. 714 (1975), this Court considered the possibility that the *Harris* rule might give police an incentive to continue questioning and might therefore result in intentional violations of the *Miranda* procedures. Nevertheless, the Court refused to reconsider the balance struck in *Harris* between exposing perjury and deterring police misconduct. Moreover, in *Michigan v. Harvey*, 494 U.S. 344, 351-52 (1990), this Court again concluded that the value of impeachment to the jury's search for truth outweighed the need to attempt to deter future police violations of rules not compelled directly by the Constitution.

The balance the Court struck in this line of cases ensures that the *Miranda* procedures will not cripple our justice system by depriving juries of the truth. The *Miranda* prophylaxes goes just far enough to ensure that a defendant will not be

convicted out of his own mouth. However, it can go no further without risking both the substantial injustice of criminals escaping the consequences of their acts by lying to juries and wholesale disrespect for the justice system which would threaten our social order and invite vigilantism.

This case demonstrates the reality of that risk. McNally told a jury that he was a victim, rather than a murderer. The judge excluded his murder confession for all purposes. As a result, the jury believed McNally's story of self-defense and convicted him of manslaughter even though he clearly attacked James Jones in Jones' own bed and stabbed him to death as he lay there naked and vulnerable. That was injustice enough. Now, the Ninth Circuit has exponentially increased the wrong by establishing a rule of law in the Ninth Circuit which will inevitably allow untold numbers of others to lie their way out of the consequences of their crimes and potentially recover civil damages.

3. The Ruling Conflicts With This Court's Decisions Establishing That The Fifth Amendment's Focus Is On The Suspect's State Of Mind, Not The Interrogator's.

This Court's decisions establish that the officer's state of mind is irrelevant to a determination of whether the suspect's Fifth

Amendment Rights have been violated. *See, e.g., Stansbury v. California*, 511 U.S. 318, 319 (1994) [whether suspect is in custody for purposes of *Miranda* turns upon his perception, not officer's]; *Rhode Island v. Innis*, 446 U.S. 446 U.S. 291, 293 (1980) [whether interrogation has occurred for *Miranda* purposes depends on suspect's perception, not officer's intent]; *Moran v. Burbine*, 475 U.S. 412 (1986) [existence of knowing waiver of *Miranda* rights depends upon suspect's state of mind, not interrogator's]. The Ninth Circuit ignored this precedent as well by concluding that a Fifth Amendment claim could rest on the officer's intent to continue questioning, rather than on the suspect's state of mind.

II. The Ninth Circuit's Ruling Greatly Exacerbates A Direct Conflict In The Circuits On Fifth Amendment Law And The Remedies For *Miranda* Violations.

A. All Other Circuits Follow The Rule That A Suspect's Fifth Amendment Rights May Only Be Violated At Trial.

The Ninth Circuit ruling below rejects established holdings of this Court that a Fifth Amendment violation can only occur at a criminal trial with the admission of a statement taken in violation of *Miranda*. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d at 1045. Respondents here have argued that McNally's confession of murder was used against him at his

sentencing hearing -- in fact the record shows that the trial judge did not consider it in sentencing him. However, even if respondents were correct, McNally's confession was excluded at his criminal trial for all purposes. Although Bey's statements were used to impeach him, the admission of the statements was harmless error. Thus, the Ninth Circuit's decision clearly holds that Fifth Amendment rights may be violated at the station house.

The Fourth Circuit recently rejected a detainee's claim that his Fifth Amendment rights were violated during a custodial interrogation and summarized the law on this point in the various circuits: "[M]ost courts refuse to find a Fifth Amendment violation even where statements were made, but were not actually used in a criminal proceeding .... Indeed, only the Ninth Circuit has held that a Fifth Amendment violation may occur even when compelled statements are never used at a criminal proceeding." *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) *citing Weaver v. Brenner*, 40 F.3d 527, 535 (2nd Cir. 1994); *Mahoney v. Kesery*, 976 F.2d 1054, 1061 (7th Cir. 1992); *David v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987); *Cooper v. Dupnik*, 963 F.2d 1220, 1238-45 (9th Cir. 1992).

The Ninth Circuit's error is compounded because it is at odds with the other circuits on the availability of a civil remedy for *Miranda* violations and on the issue of qualified immunity for Fifth Amendment violations. See *infra* pp. 24-27.

B. Only The Ninth Circuit Concludes That There Is A Civil Remedy For *Miranda* Violations.

Because the other circuits recognize that suspects do not have a constitutional right not to be questioned and also recognize that the Fifth Amendment can only be violated at trial, they have uniformly recognized that the remedy for a *Miranda* violation is exclusion of the evidence from the criminal proceeding, and not money damages under § 1983. Thus, in *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976), the court declined to subject police officers to civil liability for questioning outside of *Miranda* because:

> The Constitution and Laws of the United States do not guarantee ... the right to *Miranda* warnings[] ... it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence. No rational argument can be made in support of the notion that the failure to give *Miranda* warnings subjects a police officer to liability under the Civil Rights Act.

The Eighth Circuit reached the same conclusion in *Warren v. City of Lincoln, Nebraska*, 864 F.2d 1436 (8th Cir. 1989). ["The reading of *Miranda* warnings is a procedural safeguard rather than a right arising out of the Fifth Amendment itself ... Thus,

the remedy for a *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action."] The Tenth Circuit reiterated this rule in *Lucero v. Gunter*, 17 F.3d 1347, 1350 (6th Cir. 1994), and the Second Circuit agreed in *Neighbor v. Covert*, 68 F.3d 1508 (2nd Cir. 1995).

Last year, the Eleventh Circuit in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999), eliminated the distinction between the arguably inadvertent failure to give *Miranda* warnings and the intentional questioning of a suspect who has invoked *Miranda* rights. The court, citing *Giuffre*, *Bennett* and *Warren*, rejected the Ninth Circuit's view and stated: "We agree with the Third, Seventh, Eighth, and Tenth Circuits that failing to follow *Miranda* procedures triggers the prophylactic protection of the exclusion of evidence, but does not violate any substantive Fifth Amendment right such that a cause of action for money damages under section 1983 is created."

C. Similarly, The Ninth Circuit's Position Denying Qualified Immunity Conflicts With Other Circuits.

In *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999), the court decided that, at minimum, the officers should have been granted qualified immunity because there was not a clearly established Fifth Amendment right. This is the

same conclusion which the Third Circuit reached in a case similar to this one, *Giuffre v. Bissel*, 31 F.3d 1241 (3rd Cir. 1994). In that case, Giuffre, who was read his rights, alleged clear police misconduct during an interrogation, including officers threatening to lock up his girlfriend, take away her handicapped son and shoot his dogs. The court concluded that qualified immunity shielded the officers from civil liability for alleged violations of the Fifth Amendment. In reaching this result, the court expressly declined to adopt the Ninth Circuit's holding that the Fifth Amendment may be violated in the station house and opted instead to join the Fourth Circuit which had previously held in *Wiley v. Doory*, 14 F.3d 993, 997-98 (4th Cir. 1994) that qualified immunity shields officers in this situation.

This Court should act to bring the Ninth Circuit into the fold. Otherwise, officers in this Circuit, alone, will be forced to choose between finding the truth and protecting themselves.

III. The Ninth Circuit's Decision Conflicts In Principle With The California Supreme Court's Position On An Important Issue Of Law Because It Shifts The Focus In Determining Coercion From The Suspect's Mental State To The Mental State Of The Officer's.

In *People v. Peevy*, 17 Cal.4th 1184 (1998), the California Supreme Court considered whether an officer's *deliberate* continued questioning after

a custodial suspect's *Miranda* invocation should make the suspect's post-invocation statements inadmissible for all purposes. Peevy argued that although *Harris v. New York*, 401 U.S. 222, 224, 226 (1971) permits the use of statements taken in violation of *Miranda*, such statements should be made inadmissible for impeachment in order to prevent police misconduct. Lacking a record to support his claim of widespread "abuse", Peevy cited this case to support his claim that, because of *Harris*, officers routinely ignore suspects' invocation of the right to remain silent or to counsel.[1]

In response, the California Supreme Court carefully reviewed this Court's post-*Miranda* decisions, focusing on the balance they strike between the need for jurors to hear the truth and the need to protect a suspect's rights. The California Supreme Court emphasized two basic principles extended by this Court's precedent: first, the "search for truth" outweighs the speculative possibility that excluding statements for impeachment purposes will deter misconduct; and second, the application of the *Miranda* exclusionary rule depends on the suspect's state of mind – not the officer's. Based upon these principles, the California Supreme Court held that the deliberate continuation of questioning after an

---

[1] In fact, the record in this case shows that the Santa Monica defendants very rarely questioned outside *Miranda* and did so in this case for the purpose of ensuring proper charging and determining whether there were accomplices to the killing.

invocation did not render a post-invocation confession inadmissible for impeachment purposes.

The Ninth Circuit's decision in this case conflicts with *Peevy*. The Ninth Circuit says or suggests that deliberately continuing to question violates constitutional rights. The Ninth Circuit also concluded that the officer's state of mind, not the suspect's, is dispositive. The California Supreme Court says otherwise. This Court should resolve the conflict.

CONCLUSION

This case demonstrates the gravity and difficulty of formulating and maintaining an appropriate societal response to the ugliest of human realities: people brutally and senselessly kill other people. In addressing this reality, the courts must be guided by our basic needs and values. They require us to do three things. *First:* If we are to live in peace and safety, we must give the police the tools they need to diligently and professionally solve crimes and apprehend those who would harm us. *Second:* If we are to honor and effectuate our commitment to individual rights, we must ensure that the police treat suspects and defendants in a civilized manner. *Third:* If we are to do justice and thereby preserve confidence in the justice system, we must give juries the truth. Over the years this Court has struck a delicate balance allowing us to achieve all three of these potentially conflicting goals.

The Ninth Circuit has destroyed that balance in this case. In its zeal to control the police, the Ninth Circuit has imperiled public safety, the efficacy of the criminal justice system, and -- ultimately -- public faith in that system. How can we respect the law and the justice system if the courts allow a confessed killer to get away with murder, and then allow him to recover civilly from the police officers who relied on state-sanctioned training in questioning him? How can we expect police officers to do their job if we tell them that following their state-certified training will not shield them from potential civil liability or that they cannot rely on a federal appellate court's ruling for fear that it may later be reversed? Petitioners respectfully submit that this Court should grant this petition in order to restore the balance society needs, right the wrong done in this case, and prevent the harm that will ensue if the excesses of the Ninth Circuit's decision are not corrected.

DATED: March 30, 2000

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE; CRIMINAL COURTS BAR ASSOCIATION; JAMES MCNALLY; JAMES JOHNSON BEY,
Plaintiffs-Appellees,

v.

JAMES T. BUTTS, City of Santa Monica Chief of Police; THE CITY OF SANTA MONICA; RAY H. COOPER; SHANE TALBOT,
Defendants-Appellants,

and

WILLIE L. WILLIAMS, Chief of Police; CITY OF LOS ANGELES; RAYMOND BENNETT; MICHAEL CROSBY,
Defendants.

No. 97-56499

D.C. No. CV-95-08634-ER

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE,
Plaintiff,

and

JAMES MCNALLY; JAMES JOHNSON BEY,
Plaintiffs-Appellees,

v.

No. 97-56510

D.C. No. CV-95-08634-ER

ORDER AND AMENDED OPINION

JAMES T. BUTTS, City of Santa Monica Chief of Police; THE CITY OF SANTA MONICA; RAY H. COOPER; SHANE TALBOT; CITY OF LOS ANGELES,

Defendants-Appellees,

v.

RAYMOND BENNETT; MICHAEL CROSBY,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
December 7, 1998—Pasadena, California

Filed November 8, 1999
Amended January 3, 2000

Before: William C. Canby, Jr. and Sidney R. Thomas, Circuit Judges, and William W Schwarzer,[1] District Judge.

Opinion by Judge Canby; Partial Dissent and Concurrence by Judge Schwarzer

[1]The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

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ORDER

In the slip opinion filed in this case on November 8, 1999:

At page 13391, the second full sentence of the section entitled "*James McNally Interrogation*" is amended to read as follows:

> The interview took place in a jail in Arizona and lasted for over an hour.

At page 13397, the second full sentence of the first full paragraph is amended to read as follows:

> Los Angeles police interrogated him after he had been handcuffed to a bench at the police station for four hours.

With these amendments, the majority of the panel, as constituted above, has voted to deny the petition for panel rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judge Canby has so recommended. Judge Schwarzer has voted to grant the petition for panel rehearing and recommends granting the petition for rehearing en banc.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

OPINION

CANBY, Circuit Judge:

James McNally and James Bey, California state prisoners, joined in bringing this civil rights action against the cities of Los Angeles and Santa Monica, California, individual police officers and their respective Chiefs of Police. *See* 42 U.S.C. § 1983. McNally and Bey complain that they were the victims of a policy of the defendant police to defy the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). The alleged pol-

icy, set forth in certain training programs and materials, was to continue to interrogate suspects "outside *Miranda*" despite the suspects' invocation of their right to remain silent and their requests for an attorney.

The district court denied the motions of individual defendants James Butts, Jr., Shane Talbot, Ray Cooper, Raymond Bennett and Michael Crosby, for summary judgment on the ground of qualified immunity.[2] Those officers have now brought this interlocutory appeal challenging the denial of immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We affirm the order of the district court denying qualified immunity.[3]

BACKGROUND

Miranda requires that, once "the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. These commands are clear on their face. Statements of an accused taken in violation of *Miranda*, however, have been held admissible for purposes of impeachment of a defendant who takes the stand and testifies inconsistently with his prior statement. *See Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). The policy of questioning "outside *Miranda*" appears to be based on the proposition, which we reject, that *Harris* and *Hass*

[2]We reject the plaintiffs' contention that defendant James Butts, the Santa Monica Chief of Police, did not seek qualified immunity in the district court and is thus not entitled to this appeal. The record indicates that Butts did request qualified immunity.

[3]The order of the district court denying summary judgment is unpublished. The district court earlier entered an order denying a motion to dismiss on the ground of qualified immunity. That order is published. *See California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327 (C.D. Cal. 1996).

negate the quoted imperatives of *Miranda*.[4] How the policy of questioning "outside *Miranda*" worked in practice in these two cases is best demonstrated by the transcripts of the taped interview sessions with McNally and Bey.

James McNally Interrogation

Santa Monica detectives interrogated McNally about his role in a brutal murder. The interview took place in a jail in Arizona and lasted for over an hour. McNally was advised of his *Miranda* rights and freely answered questions for a considerable period of time. He did not deny having stabbed the victim, but claimed that he had acted in self-defense. Eventually, the discussion focused on the degree of crime that might be charged, and whether McNally would waive extradition. At this point, the questioning took the following turn:

> McNally: How 'bout we do this? How 'bout I'll waive extradition. I'll go with "you's." Let me talk to a California lawyer and we'll get back together.
>
> D1:[5] You'll what?
>
> McNally: Okay. I'm saying, "I'll waive extradition. I'll go with "you's"— no hassle, no problem . . . .
>
> D: Okay. Under, understand . . . .
>
> McNally: So . . .

[4]The defendants do not urge that their questioning of McNally and Bey after they requested an attorney was justified by exigent circumstances. There was, for example, no ticking bomb that had to be located. *Cf. New York v. Quarles*, 467 U.S. 649 (1984) (recognizing public safety exception to *Miranda*).

[5]In the transcript, "D" is Detective Talbot; "D1" is Detective Cooper. McNally is abbreviated "M" in the transcript but is spelled out here to aid understanding.

D: . . . understand what happens when you get to California — when you get your attorney. No attorney in his right mind is gonna' tell you talk with the police.

McNally: Oh, I know . . .

D: Justice works the same way as it does on the East Coast.

McNally: No, I, I understand. I, I just wanna' clarify a couple things in my mind. I, I know that. I know a lawyer's not gonna' tell me to talk to "you's."

D: Right.

McNally: I know that. Let me just talk to him about a couple — you know, I know Pennsylvania Law just 'cuz I've been through it. I don't know California Law. I don't . . . let me talk to him a little bit and we'll get back — I promise I'll get back together with "you's."

D: So, you don't wanna' . . . .

D1: You're not gonna tell us . . .

D: . . . you don't wanna' tell us what happened . . .

McNally: No . . .

D: . . . now?

McNally: . . . not at this time. It's, it's too scary for me right now. I'd, I'd rather talk to a lawyer.

D: Alright.

McNally: I'm not trying to impede your investigation.

D: No, I understand.

McNally: I'll with "you's" . . . [sic]

D: I understand.

McNally: . . . no hassle . . . .

D: Okay, now, let me, let me explain to you what's happened. You've basically invoked your Right to have an attorney . . .

McNally: Right.

D: . . . okay? At this point, nothing that you say can be used against you in Court . . . in California because you have invoked your Right to have an attorney.

McNally: Right.

D: I still would like to know what happened now because — well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

So, basically, what they'll do is they'll play a game of "what's this case worth?" And they'll do "make, let's make a deal type thing."

McNally: I know.

D: What I wanna' know from you now is what you might tell me later so I know what you tell me later

is the same as what you're gonna' tell me now because what you tell me later is gonna' be on the record.

D1: This is all on tape. This — what we're tellin' you. You've invoked your Rights. Everything from this point on . . .

D: Cannot . . .

D1: . . . regarding this case cannot be used against you. We're, we're making you the guarantee. It won't . . . you know, even though its on tape . . . .

McNally: Shut that thing off then.

D: Well, this is the record of what you're telling us. You, we . . .

D1: Yeah. It's also the record of you invoking your Rights. You want an attorney . . . . which is fine . . .

D: And it's — let me explain to you something else. Basically, what this does is validate for you and for the District Attorney that what you tell me now is what you're gonna' tell — hopefully, tell us later. 'Cuz the evidence will bear out, I think, what I, I already know.

So, once we start a tape, we don't turn it off. If you wanna' turn off the tape then we stop the conversation and, and we'll go ahead . . . .

D1: See . . .

D: . . . and do the process. I just wanted to explain to you and I'm not trying to be "hard ass" about this. It's just the way I work. I know it's the way the Dis-

trict Attorney that I'm working with, uh, Richard Stone, works. We just — and if you were in our place, would you trust something that somebody told you after they talked to an attorney?

D1: It's like "black mail" with attorneys, Man. We know that.

D: I mean, I mean, first of all, if you could trust the attorney that you're working with he's gonna', and if you can work and if you tell him the truth, he gonna' work with you somehow to make a better deal, okay?

McNally: (no audible response).

D: They're, the deal is here. It's up to them . . .

D1: It's . . .

D: . . . it's up to them to talk about it. The only thing is, everything that falls after this — we'll go in one direction based on the physical evidence and the statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna' push it.

McNally: Right.

D: Okay, and fuck your attorney. It's just — I don't care about him anymore.

McNally: Yeah.

D: Okay. As far as I'm concerned, you know, they really mess up the system. I wanna' know now what you're going to tell me later. It can't be used against you. We . . .

D1: This is your opportunity.

D: . . . told you that.

D1: And it's — this is your opportunity and it's not gonna' be used against you. If you . . .

D: If you want, you can write it out and start it with "The Detective told me this statement cannot be used against me . . ." I'll sign it and I'll make a xerox copy of it and you can have a xerox. It's up to you. I'm not tryin' to trick you here.

(pause)

McNally: Alright. I'll . . . and this can't be used against me.

D1: No, absolutely. It's right on there. It's not — we're promising you, it's not gonna' be used against you — in the case in chief — against you, okay? Just, this is for our edification of what happened.

McNally then proceeded to tell the detectives a very different, and far more incriminating story.

At his trial, McNally moved to suppress his incriminating statement, and the trial court granted the motion, prohibiting the use of the statement even for purposes of impeachment. After McNally was convicted, however, the prosecutor used the statement against McNally at sentencing to urge the court to consider as an aggravating factor McNally's assertions of self-defense in contradiction of his statement to the police.

James Bey Interrogation

Bey was also suspected of a brutal murder. Los Angeles police interrogated him after he had been handcuffed to a

bench at the police station for four hours. He was asked a few questions about the matter before he was given his *Miranda* warnings. Immediately thereafter, the following exchange occurred:

> Bey: Am I being charged with murder? If I'm being charged with murder, then I won't have another word to say until I have an attorney.
>
> D[6]: Is that — ah — your feelings? Do you — That's why I questioned you, do you wish to—
>
> Bey: *** if you read me those rights, you must be gonna charge me with something. So I'll wait and see what happens. I won't say another word until I have an attorney.
>
> D: Well, like you say yourself, James, you're a suspect.
>
> Bey: Well, if I'm being charged with something, I'd rather not have anything else to say until I have an attorney.
>
> D: Okay?
>
> Let me explain something to you, James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court.
>
> U: I think James is familiar with out *** outside Miranda. Are you familiar with that, James?

[6]In the Transcript, "D" is Detective Bennett; "U" is an "unidentified detective," alleged elsewhere to be Detective Crosby. In the Transcript, Bey is denoted as "B" but his name is spelled out here for ease of understanding. Unintelligible passages in the tape of interview are denoted in the Transcript by asterisks: "***."

Bey: I don't — I don't know too much about the law. I'm just telling you I know to keep my mouth shut *** somebody to put me in jail.

D: Well, James, I'll tell you what, there's a lot of physical evidence which doesn't lie, James.

Do you know why we were so long before we got here to talk to you?

Bey: No, I don't. I know that you all were in my apartment looking around. I don't know what you were looking for.

D: Not only looking around. We were in your apartment with our what they call Scientific Investigation Division people, or personnel. These are experts in getting physical evidence.

Bey: Uh-huh.

D: And we got some very incriminating physical evidence, my friend.

Bey: ***

D: Stuff that can't be explained away.

Bey: Well, we'll have to see what happens. But I'm not gonna say nothing *** an attorney ***.

D: Why don't you tell me what happened that night?

Thereafter, Bey admitted that the murder victim had been in his apartment on the night she was killed, and that she had previously "ripped him off" of small amounts of money. He also made various other statements about the evening in question, although he denied committing the murder. Bey stated in

his deposition that Detective Bennett appeared angry at times during the interview, spoke loudly, made threatening gestures, and adopted a "condemnatory" tone.

At trial, Bey testified and his statement was used to impeach him. He was convicted of first degree murder. On appeal, the state court of appeal, after reviewing the uncontradicted evidence, stated: "We . . . are compelled to conclude that under these circumstances, appellant's statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony." *People v. Bey*, 27 Cal. Rptr. 2d 28, 31 (1993). The court held the error to be harmless, however, and affirmed the conviction. *Id.* at 32.

DISCUSSION

There can be little question that the insistence of the above interrogators on questioning after invocation of the right to silence and unequivocal requests for counsel violated the strictures of *Miranda* and did so intentionally. The defendants contend, however, that they are nevertheless entitled to qualified immunity because reasonable officers in their position could have believed that their interrogation did not violate "clearly established rights" of McNally and Bey. *See Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). Their contention is based on three propositions, all of which we reject: (1) that McNally and Bey have not alleged violation of a constitutional right; (2) that the right was not clearly established, in light of subsequent qualifications of *Miranda*; and (3) that the defendants could reasonably rely on training materials endorsing questioning "outside *Miranda*." We address these contentions in turn.

The Constitutional Right

[1] The first question is whether McNally and Bey have alleged the violation of a constitutional right at all. *See County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5

(1998). The defendants contend that *Miranda* is a prophylactic rule, not a constitutional right. In the narrowest sense, this contention is correct: there is no constitutional right to the *Miranda* warnings themselves. *New York v. Quarles*, 467 U.S. 649, 654 (1984). But *Miranda* rights are brigaded with the right against self-incrimination and supply " 'practical reinforcement' for the Fifth Amendment right." *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). Indeed, the connection between *Miranda* and the constitutional right against self-incrimination is demonstrated by the fact that *Miranda* reversed a state court judgment, even though the Supreme Court observed that it "might not find the defendants' statements to have been involuntary in traditional terms." *Miranda*, 384 U.S. at 457. The Supreme Court has continued to enforce *Miranda* in both direct and habeas corpus review of state court judgments. *See, e.g., Minnick v. Mississippi*, 498 U.S. 146 (1990) (direct review); *Withrow v. Williams*, 507 U.S. 680 (1993) (habeas corpus). The Supreme Court's review of state judgments is confined, of course, to constitutional issues; it has no power to enforce mere supervisory rules on the States. *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991). Thus *Miranda* cannot be viewed entirely apart from the constitutional rights that it protects.

The defendants argue, however, that all of these cases deal with the *admission* of statements taken in violation of *Miranda*; they do not deal with a right against questioning apart from use of the statements at trial.[7] It is very difficult, however, to read *Miranda* that way:

[7]There is a certain perversity in this argument. The exclusionary rule is strong and unpleasant medicine that can keep probative evidence from the jury. The primary reason for employing the rule, with all its disadvantages, is that it is normally the most effective way to achieve the overarching goal of controlling police behavior that threatens the constitutional rights of individuals. *See, e.g., Elkins v. United States*, 364 U.S. 206, 217-18 (1960). It makes no sense to hold that other means of controlling police behavior ought not to be permitted because the exclusionary rule, though ineffective for the purpose, is in place.

> Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside of criminal court proceedings and serves to protect persons in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and *the exercise of those rights must be fully honored.*

Miranda, 384 U.S. at 467 (emphases added). This language focuses on rights of individuals *at interrogation.*

In any event, we have squarely rejected the defendants' contention in *Cooper v. Dupnik*, 963 F.2d 1220, 1251 (9th Cir. 1992) (en banc). "It is wrong . . . to relegate [the warning of the right to remain silent] to the status of 'only a prophylactic device': It is a prophylactic device, but it expresses a substantive right." *Id.* at 1240. In *Cooper*, we rejected a claim of qualified immunity asserted on behalf of officers who had interrogated a suspect who was never tried. We held that the request for an attorney is an "invocation of the substantive right to remain silent." *Id.* We held that the decision to interrogate Cooper despite his requests for an attorney, and to persist until Cooper broke down (even though he never confessed), was coercive and violated Cooper's constitutional rights. "It is irrelevant that Cooper's coerced statements were never introduced against him at trial. The Task Force's

wrongdoing was complete at the moment it forced Cooper to speak." *Id.* at 1237.[8]

[2] The defendants seek to distinguish *Cooper* on the ground that the nature of the questioning there was far more intimidating and coercive than that directed at McNally and Bey. They rely on *Cooper*'s point that a bare violation of *Miranda* is not enough to sustain a claim under § 1983:

> This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a *benign way, without coercion or tactics that compel him to speak.* What we do confront is a case laden with police misconduct that is "identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed."

Cooper, 963 F.2d at 1244 (emphasis added) (quoting *Tucker*, 417 U.S. at 444). But coercion has been claimed and the question whether it occurred remains to be tried; the district court held that McNally and Bey had raised a material issue of fact on that point, and denied summary judgment.[9] The district court's ruling is not surprising, in light of the fact that the state trial court suppressed McNally's statement even for impeachment purposes, and the state appellate court expressly concluded that Bey's statement was coerced. The district court was well aware of the distinction reflected in the above quotation from *Cooper*, but it also recognized that a failure to

[8]Thus McNally's and Bey's claims are not defeated by the fact that their statements may not have caused them harm at their trials; they seek redress for violations of their rights in the jail or stationhouse, not in the courthouse.

[9]McNally and Bey moved for summary judgment on their claim; the district court denied the motion. That denial of summary judgment, of course, is not subject to interlocutory appeal and is not before us. *See* 28 U.S.C. § 1291.

comply with *Miranda* can be viewed as an aggravation of other coercive tactics. *California Attys. for Criminal Justice v. Butts*, 922 F. Supp. 327, 336 & n.13 (C.D. Cal. 1996); *see Collazo v. Estelle*, 940 F.2d 411, 418 (9th Cir. 1991). Indeed, in recently holding a confession to have been coerced, we placed great emphasis on the fact that officers had ignored a request for counsel and had misrepresented that any statement thereafter made could not be used in court. *See Henry v. Kernan*, 177 F.3d 1152, 1158 (9th Cir. 1999). In any event, the nature and effect of the defendants' tactics in this case are yet to be resolved by the trier of fact. To the extent that the defendants' claim of immunity depends upon unresolved and genuine issues of fact, it is not appropriate for review on this interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995); *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

The Right is Clearly Established

[3] To be "clearly established" for the purpose of overcoming qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. *Miranda* could scarcely be more clear in stating that, once a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease*," and that if he "states that he wants an attorney, the interrogation *must cease until an attorney is present*." *Miranda*, 384 U.S. at 473-74 (emphases added). *See also Davis v. United States*, 512 U.S. 452, 458 (1994); *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991); *Minnick*, 498 U.S. at 152. The rule under these decisions is unmistakable. As we held in *Cooper*, "[t]here is no question that the Constitutional holding in *Miranda* is 'clearly established' law." *Cooper*, 963 F.2d at 1237.[10]

[10]Defendants also point out that *Cooper* was the first case that allowed recovery under § 1983 for interrogation "outside" Miranda. Accordingly,

[4] There is equally no question that reasonable officers in the defendants' position would know that their actions violated McNally's and Bey's *Miranda* rights. McNally and Bey both invoked their rights to speak to an attorney, in a manner indicating that they did not want the interrogation to proceed without such a consultation. The detectives deliberately ignored these requests. Yet, "[t]he *per se* aspect of *Miranda* was . . . based on the unique role the lawyer plays in the adversary system of criminal justice in this country." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). The detectives in McNally's case nevertheless attempted to discourage him from seeking counsel, implied that his situation would become much worse if he spoke with an attorney, and assured him that whatever he said could not be used against him in any way. After telling McNally several times that anything he said thereafter could not be used against him, one of the detectives inserted "in the case in chief," with no explanation of what that term meant. This unexplained qualification, which McNally has asserted he did not understand, cannot overcome the many untrue and unqualified statements that preceded it.[11]

---

because *Cooper* was decided after these interrogations, the detectives argue that they were not on notice that their conduct was unconstitutional. This argument misunderstands both *Cooper* and the qualified immunity analysis. First, in *Cooper* we did not *establish* that this conduct is unconstitutional — we *recognized* it. We held that Cooper's rights were clearly established *at the time of his interrogation in 1986* — years before the interrogation of McNally and Bey. *Cooper*, 963 F.2d at 1237 ("Appellants knew [in 1986] that they were violating the Constitution.") Second, even without an analogous case, the Supreme Court "and our case law do not require that degree of specificity." *Hyland v. Wonder*, 117 F.3d 405, 412 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1166 (1998). It is not necessary that a case has previously declared the very conduct in question unlawful. We only require that the "unlawfulness must be apparent." *Id.*; *see also Anderson*, 483 U.S. at 640.

[11]We recognize that subterfuge may be used in interrogating suspects, but misstating the legal use that can be made of their statements is not a permissible form of subterfuge. *Miranda* requires that suspects be advised that their statements can be used against them, *see Miranda*, 384 U.S. at 469; it can hardly countenance false advice that the statement *cannot* be used against them.

In Bey's case, the interrogator told Bey that he was going to continue to ask him questions after he asserted his right to remain silent. He went on to advise Bey that because he didn't waive his rights, "[t]hat means we can't use [any subsequent statements] in court." *Bey*, 27 Cal. Rptr. 2d at 30. On appeal, the state court found this to be a "very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to appellant about the legal consequences of that violation." *Id.* In so continuing interrogation and misinforming McNally and Bey concerning the legal effects of that interrogation, the defendants clearly violated the *Miranda* imperatives, thereby creating a danger of coercion as well as a presumption of it. *See Oregon v. Elstad*, 470 U.S. 298, 307 n.1 (*Miranda* violation creates legal presumption of coercion). Nearly identical conduct was one of the major factors leading us to find a confession involuntary in *Henry*, 177 F.3d at 1157.

The defendants contend they could not have known that their conduct violated clearly established rights because of the Supreme Court's rulings that statements taken in violation of the *Miranda* safeguards may be used for purposes of impeachment. *See e.g.*, *Oregon v. Hass*, 420 U.S. 714, 723-24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971). They also rely on *Tucker*, in which the Court permitted the testimony of a witness who had been identified by the defendant in an interview preceded by incomplete advice of his rights. *See Tucker*, 417 U.S. at 438; *but see Mincey v. Arizona*, 437 U.S. 385, 398 (1978) ("involuntary" statements not allowed for any purpose). Thus, the defendants argue that they could reasonably believe that it was lawful to continue to press their interrogation, with misleading assurances that any further statements made by McNally or Bey could not be used against them.

Harris and *Tucker* are easily distinguished from the present case; both involved interrogations that preceded the decision in *Miranda*. In *Tucker*, the Supreme Court relied on that

point, as well as on the fact that the police had acted "in complete good faith." *Tucker*, 417 U.S. at 447. The interrogation in *Hass* did succeed *Miranda*, however; the defendant was being driven to the police station, was given *Miranda* warnings, and said he wanted to call a lawyer. He was told he could do so when they arrived, but there was further conversation about the crime during the rest of the trip. *Hass*, 420 U.S. at 715-17. The defendant's statements were held to be admissible for impeachment. *Id.* at 723-24. *Hass* did not appear, however, to involve a conscious decision to continue interrogation in the hope of obtaining impeachment evidence. That officers might so behave was described as a "speculative possibility," but in any event the Court determined to follow *Harris* and permit use of the statement for impeachment. *Id.* at 723.

[5] The Supreme Court has never suggested, however, that these decisions dealing with the peripheral use of statements obtained in violation of *Miranda* somehow overcame *Miranda*'s imperatives concerning proper police procedure. Indeed, the Court has on several occasions, after *Harris*, *Tucker*, and *Hass*, restated those imperatives. In *Fare v. Michael C.*, for example, the Court said:

> Whatever the defects, if any, of this relatively rigid requirement that interrogation cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.

Fare, 442 U.S. at 718. The Supreme Court later canvassed the *Miranda* progeny in *Edwards v. Arizona*, 451 U.S. 477 (1981), stating:

> We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with

> *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Id. at 485. Again, in *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court observed that "[t]he *Edwards* rule thus serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Id.* at 682. *See also Davis*, 512 U.S. at 458; *McNeil*, 501 U.S. at 177; *Minnick*, 498 U.S. at 151.

[6] These cases indicate that there has been no weakening in *Miranda*'s mandates to protect the *rights* of suspects *during* custodial interrogation. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 99 (1975) (*Miranda* promulgated "safeguards to protect the . . . constitutional rights of persons subjected to custodial police interrogation."). In the face of these clear and unequivocal directions, reasonable officers in the position of defendants would have understood that they were violating the rights of McNally and Bey in interrogating them in the manner that they did. "Any minimally trained police officer should have known such pressure was improper and likely to produce involuntary statements." *Henry*, 177 F.3d at 1158.

Reliance on Training and Training Materials

[7] The defendants next contend that their reliance on training and training materials entitles them to qualified immunity. The district court rejected this argument holding that "following orders" will only insulate officers from liability when "reliance is objectively reasonable." *Butts*, 922 F. Supp. at 338. The court concluded that a "reasonable person could not reconcile the alleged practice of ignoring the assertion of *Miranda* rights with the commands of *Miranda*, and hence, reliance on the alleged policy cannot be objectively reasonable." *Id.*; *see also Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[I]ndividuals cannot always

be held immune for the results of their official conduct simply because they were enforcing policies or orders . . . .").

[8] The fact that Los Angeles and Santa Monica may have trained their police to violate the rights of individuals does not provide any defense for these officers. Their policy contradicts the safeguards provided by *Miranda*, and, at the very least, is in direct conflict with *Cooper*. Contrary to the assertions by the defendants, *Cooper* did not sanction this technique:

> The primary aggravating circumstance *is the Task Force's purpose* of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense — as Taylor said, "to help keep him off the stand." By forcing Cooper to talk in the police station, the officers hoped to prevent him from being able to do so in the courtroom. We note that their purpose was not just to be able to impeach him if he took the stand and lied, but to keep him off the stand altogether. *This tactic corrupts the doctrine* [the impeachment exception] established in *Harris*.

Cooper, 963 F.2d at 1249 (emphases added) (analyzing whether the police conduct "shocks the conscience"). Furthermore, training officers that inadmissible statements may nevertheless be used for impeachment purposes hardly sanctions this tactic of routinely and intentionally ignoring requests to speak to an attorney. For all of the reasons set forth in the preceding section of this opinion, a reasonable police officer should have known that this conduct was improper and violated the rights of McNally and Bey, whether or not the conduct was endorsed by training materials. Moreover, these officers had discretion over their interrogation methods. Their training did not require officers to interrogate "outside *Miranda*." They acted at their own election.

CONCLUSION

[9] The issue in this case is limited to whether these officers are entitled to qualified immunity as a matter of law. Accepting the facts as presented by McNally and Bey, as we must on summary judgment, *see Behrens*, 516 U.S. at 312-13, we conclude that the district court correctly ruled that the defendants were not entitled to qualified immunity. Officers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions.

The order of the district court denying summary judgment on the ground of qualified immunity is

AFFIRMED.

SCHWARZER, Senior District Judge, Dissenting and Concurring:

I respectfully dissent as to plaintiff James Bey and concur in the judgment as to plaintiff James McNally. *Anderson v. Creighton*, 483 U.S. 635 (1987), tells us that the discretionary acts of government officials are protected by qualified immunity unless

> the right the official is alleged to have violated . . . [has] been 'clearly established.' The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [That] is to say that in the light of pre existing law the unlawfulness must be apparent.

Id. at 640. In determining the validity of the qualified immunity claim, therefore, we must look at the state of the law at the time the conduct complained of occurred. *See Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1451 (9th Cir. 1995)

(qualified immunity upheld because right of action under Title IX not clearly established until Supreme Court so decided, subsequent to the complained of conduct).

I. BEY

The majority rests its decision on the proposition that "[o]fficers who intentionally violate the rights protected by Miranda [[by] insistence . . . on questioning after invocation of the right to silence and unequivocal requests for counsel] must expect to have to defend themselves in civil actions." Op. at 76. Plaintiff James Bey was interrogated on March 8, 1991, by Officers Raymond Bennett and Michael Crosby. On February 6, 1991, one month earlier, a panel of this court decided *Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991) (*Cooper I*), *rev'd en banc*, 963 F.2d 1220 (9th Cir. 1992) (*Cooper II*). Cooper had brought a § 1983 action against police officers and others alleging various violations of his constitutional rights in connection with his interrogation while in custody. The opinion states that "Cooper contends that his continued interrogation, following his clear and unequivocal request to contact his attorney is a patent violation of the constitution." *Id.* at 1526. It then goes on to firmly reject this contention, reversing the denial of qualified immunity, stating:

> Although there is no case on point from our circuit, all out-of-circuit cases hold that a plaintiff may not, as matter of law, maintain a section 1983 action based upon the failure by the police to issue Miranda warnings. [Citations omitted.] . . . These cases are not precisely on point, since in the instant case the police gave the Miranda warnings but refused to allow Cooper to exercise his rights. But the reasoning of these cases does apply—since Miranda requirements are not a constitutional prerequisite, their violation cannot form the basis of a section 1983 suit . . . . Cooper can cite to no case allowing

> a section 1983 suit under the circumstances of his case.

Id. at 1527-28.[1]

Moreover, the Supreme Court had repeatedly held prior to March 1991 that Miranda's warning requirement is not a dictate of the Fifth Amendment. Thus, in *Connecticut v. Barrett*, 479 U.S. 523 (1987), the Court said:

> It remains clear, however, that this prohibition on further questioning—like other aspects of Miranda—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose. [Citation omitted.] By prohibiting further interrogation after the invocation of these rights, we erect an auxiliary barrier against police coercion.

Id. at 528. *See also Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (finding "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"); *New York v. Quarles*, 467 U.S. 649, 653 & n.3 (1984) (because Miranda is only a "prophylactic" rule, the Court considered a threat to public safety and acknowledged some "limited circumstances where the judicially imposed strictures of Miranda are inapplicable"); *Duckworth v. Eagan*, 492 U.S. 195, 201-03 (1989) (telling a suspect that an attorney will only be appointed if and when the suspect goes to trial does not render the notice constitutionally inadequate because the warnings mandated by Miranda are "procedural safeguards" and "prophylactic," not requiring administration in any exact

[1]The dissenting opinion did not take issue with this reasoning but read the allegations of the complaint as stating a claim for violation of rights secured by the Fifth, Sixth and Fourteenth Amendments. *Id.* at 1538.

form); *Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) (admitting a statement made without counsel and "not subject to proper Miranda" for impeachment purposes because the violations alleged "relate only to procedural safeguards"). Similarly, the Ninth Circuit prior to March 1991 did not recognize Miranda warnings as a cognizable constitutional right. "Miranda violations do not abridge the Fifth Amendment constitutional privilege against self-incrimination, but instead involve prophylactic standards laid down to safeguard that privilege." *United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987).

In declaring that "continued interrogation after a defendant invokes his Miranda right to counsel does not violate the Fifth Amendment," *Cooper*, 924 F.2d at 1528, and "that a violation of Miranda rights is not itself a violation of the constitution," *Id.* at 1527, the opinion in *Cooper I* was consistent with prior Supreme Court and Ninth Circuit law as it stood in 1991. Thus, the rationale of the majority opinion—that the officers violated a clearly established constitutional right by questioning Bey after he invoked his right to silence—cannot stand.[2] Bey argues, however, that this case is not about violation of the Miranda rules, but about coercion in violation of the Fifth Amendment. The question remains whether in 1991 there was clearly established law that the officers' interrogation violated the Fifth Amendment, i.e., when they continued the interrogation despite the suspect's repeated attempts to invoke his Miranda rights, asserted that they could not use his statements in court, and claimed that they possessed incriminating physical evidence. Op. at 66-67. It is not enough for the court simply to say that such interrogation tactics may be found to be

[2]It is true that in *Cooper II*, the court found that the officers knew in 1986 that they were violating the Constitution. 963 F.2d at 1237. Apart from the fact that the conduct involving Bey was substantially different from that involved in *Cooper*, the officers in *Cooper* did not have before them a court of appeals opinion rendered the preceding month that told them that violation of the Miranda rules was not a constitutional violation that could support a § 1983 claim.

coercive; for qualified immunity to be overcome, the law to that effect must be clearly established. The majority's reliance on the Miranda rules on this issue is a bootstrap argument for, as noted, those rules do not establish a constitutional right. The Court's statement in *Anderson v. Creighton*, 483 U.S. 635 is apposite: "[I]f the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*[*v. Fitzgerald*, 457 U.S. 800 (1982)]." *Id.* at 639. *Anderson* requires that "in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640. Because there was no such law in 1991, defendants' qualified immunity motion as to Bey's claims should have been granted.

II. McNALLY

Plaintiff James McNally was interrogated by Officers Ray Cooper and Shane Talbot on March 2, 1993. *Cooper II* had been decided on May 5, 1992, ten months earlier. In *Cooper II*, an *en banc* panel of this court reversed *Cooper I* and found interrogation "that was involuntary *because it was actively compelled and coerced* by law-enforcement officers during in-custody questioning" can form the basis for a § 1983 action against the police officers who interrogated him. *Cooper*, 963 F.2d at 1243. The limits of *Cooper II*'s holding, as relevant to this case, are encapsulated in the following statement: "This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak." *Id.* at 1244. It is plain, therefore, that *Cooper II* does not establish law that supports the majority opinion's broad rationale that "the insistence of the . . . interrogators on questioning after invocation of the right to silence and unequivocal requests for counsel violated the strictures of Miranda" and thereby barred qualified immunity. Op. at 66. Before a constitutional violation can be found, there must be more than a Miranda infraction—there must be

coercive tactics that compel the suspect to speak in violation of the Fifth Amendment. *Id.* at 1243-1244.

The question is what tactics, in 1993, were clearly established by law to be coercion violating the Fifth Amendment. The majority summarizes the conduct of the officers as "attempt[ing] to discourage [McNally] from seeking counsel, impl[ying] that his situation would become much worse if he spoke with an attorney, and assur[ing] him that whatever he said could not be used against him in any way." Op. at 71.[3] In July 1991, this court held substantially similar questioning of a suspect to be coercion violating the Fifth Amendment. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (*en banc*). The critical colloquy between Detective Destro and defendant Collazo, after Collazo asked if he could speak with a lawyer, went as follows:

> Destro:—Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police. Then it might be worse for you.

---

[3]Note that Bey's case is different, both on its facts and on its timing. The officers interrogating Bey in 1991 did not denigrate the role of counsel or threaten Bey with harsher treatment as a result of his invocation of his right to remain silent. In contrast, in McNally's interrogation, the detectives repeatedly indicated they would not trust McNally if he chose to consult a lawyer:

> Detective: —[Y]ou have invoked your right to have an attorney.
>
> McNally: —Right.
>
> Detective: —I still would like to know what happened now because—well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

The detectives went on to demean the role of counsel at least four more times, saying attorneys "really mess up the system," "fuck your attorney," "it's like black mail with attorneys, man," and "would you trust something that somebody told you after they talked to an attorney?" McNally proceeded to confess to the murder.

Collazo:—Pardon me?

Destro:—Then it might be worse for you.

Id. at 414.[4] The court held that "demean[ing] the pretrial role of counsel," *id.* at 418, in an "attempt to discourage Collazo from speaking to a lawyer," *id.* at 416, "l[eading] Collazo to believe he could reap some legal benefit by excluding defense attorneys from the pre-trial process," *id.* at 418, and "attempt[ing] in the police station to impose a penalty on Collazo's choice to remain silent amount[ed] to a serious infringement of Collazo's Fifth Amendment right." *Id.* at 417. The court concluded that "Officer Destro's overreaching behavior violated not only Miranda, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses." *Id.* at 419.

Because it was clearly established, prior to McNally's interrogation, that denigrating the role of counsel and threatening to impose a penalty on a suspect's exercise of his Fifth Amendment rights constitutes coercion violating the Fifth Amendment, Officers Cooper and Talbot are not entitled to qualified immunity. I therefore concur in the judgment affirming the denial of qualified immunity.

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[4]It was clearly established law in 1993 that a detective during interrogation cannot threaten a suspect with harsher treatment as a result of a suspect's decision to remain silent and not cooperate. *See United States v. Tingle*, 658 F.2d 1332, 1336, n.5 (9th Cir. 1981) ("[I]t is permissible for an interrogating officer to represent, under some circumstances, that the fact that the defendant cooperates will be communicated to the proper authorities, the same cannot be said of a representation that a defendant's failure to cooperate will be communicated to a prosecutor. Refusal to cooperate is every defendant's right under the fifth amendment."). *See also United States v. Guerrero*, 847 F.2d 1363, 1366 & n.2 (9th Cir. 1988) (noting that recommendations of leniency as a result of cooperation are appropriate, but "threatening to inform the prosecutor of a suspect's refusal to cooperate violates her fifth amendment right to remain silent.").

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE; CRIMINAL COURTS BAR ASSOCIATION; JAMES MCNALLY; JAMES JOHNSON BEY,
Plaintiffs-Appellees,

v.

JAMES T. BUTTS, City of Santa Monica Chief of Police; THE CITY OF SANTA MONICA; RAY H. COOPER; SHANE TALBOT,
Defendants-Appellants,

and

WILLIE L. WILLIAMS, Chief of Police; CITY OF LOS ANGELES; RAYMOND BENNETT; MICHAEL CROSBY,
Defendants.

No. 97-56499

D.C. No. CV-95-08634-ER

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE,
Plaintiff,

JAMES MCNALLY; JAMES JOHNSON BEY,
Plaintiffs-Appellees,

v.

No. 97-56510

D.C. No. CV-95-08634-ER

OPINION

JAMES T. BUTTS, City of Santa Monica Chief of Police; THE CITY OF SANTA MONICA; RAY H. COOPER; SHANE TALBOT; CITY OF LOS ANGELES,

Defendants-Appellees,

v.

RAYMOND BENNETT; MICHAEL CROSBY,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
December 7, 1998—Pasadena, California

Filed November 8, 1999

Before: William C. Canby, Jr. and Sidney R. Thomas, Circuit Judges, and William W Schwarzer,[1] District Judge.

Opinion by Judge Canby; Partial Dissent and Concurrence by Judge Schwarzer

[1]The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

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OPINION

CANBY, Circuit Judge:

James McNally and James Bey, California state prisoners, joined in bringing this civil rights action against the cities of Los Angeles and Santa Monica, California, individual police officers and their respective Chiefs of Police. *See* 42 U.S.C.

§ 1983. McNally and Bey complain that they were the victims of a policy of the defendant police to defy the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). The alleged policy, set forth in certain training programs and materials, was to continue to interrogate suspects "outside *Miranda*" despite the suspects' invocation of their right to remain silent and their requests for an attorney.

The district court denied the motions of individual defendants James Butts, Jr., Shane Talbot, Ray Cooper, Raymond Bennett and Michael Crosby, for summary judgment on the ground of qualified immunity.[2] Those officers have now brought this interlocutory appeal challenging the denial of immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We affirm the order of the district court denying qualified immunity.[3]

BACKGROUND

Miranda requires that, once "the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. These commands are clear on their face. Statements of an accused taken in violation of *Miranda*, however, have been held admissible for purposes of impeachment of a defendant who takes the stand and testifies inconsistently with his prior statement. *See Oregon v. Hass*, 420 U.S.

[2]We reject the plaintiffs' contention that defendant James Butts, the Santa Monica Chief of Police, did not seek qualified immunity in the district court and is thus not entitled to this appeal. The record indicates that Butts did request qualified immunity.

[3]The order of the district court denying summary judgment is unpublished. The district court earlier entered an order denying a motion to dismiss on the ground of qualified immunity. That order is published. *See California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327 (C.D. Cal. 1996).

BEST AVAILABLE

714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). The policy of questioning "outside *Miranda*" appears to be based on the proposition, which we reject, that *Harris* and *Hass* negate the quoted imperatives of *Miranda*.[4] How the policy of questioning "outside *Miranda*" worked in practice in these two cases is best demonstrated by the transcripts of the taped interview sessions with McNally and Bey.

James McNally Interrogation

Santa Monica detectives interrogated McNally about his role in a brutal murder. The interview took place in a jail in Arizona and lasted for several hours. McNally was advised of his *Miranda* rights and freely answered questions for a considerable period of time. He did not deny having stabbed the victim, but claimed that he had acted in self-defense. Eventually, the discussion focused on the degree of crime that might be charged, and whether McNally would waive extradition. At this point, the questioning took the following turn:

> McNally: How 'bout we do this? How 'bout I'll waive extradition. I'll go with "you's." Let me talk to a California lawyer and we'll get back together.
>
> D1:[5] You'll what?
>
> McNally: Okay. I'm saying, "I'll waive extradition. I'll go with "you's"— no hassle, no problem . . . .

[4] The defendants do not urge that their questioning of McNally and Bey after they requested an attorney was justified by exigent circumstances. There was, for example, no ticking bomb that had to be located. *Cf. New York v. Quarles*, 467 U.S. 649 (1984) (recognizing public safety exception to *Miranda*).

[5] In the transcript, "D" is Detective Talbot; "D1" is Detective Cooper. McNally is abbreviated "M" in the transcript but is spelled out here to aid understanding.

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D: Okay. Under, understand . . . .

McNally: So . . .

D: . . . understand what happens when you get to California — when you get your attorney. No attorney in his right mind is gonna' tell you talk with the police.

McNally: Oh, I know . . .

D: Justice works the same way as it does on the East Coast.

McNally: No, I, I understand. I, I just wanna' clarify a couple things in my mind. I, I know that. I know a lawyer's not gonna' tell me to talk to "you's."

D: Right.

McNally: I know that. Let me just talk to him about a couple — you know, I know Pennsylvania Law just 'cuz I've been through it. I don't know California Law. I don't . . . let me talk to him a little bit and we'll get back — I promise I'll get back together with "you's."

D: So, you don't wanna' . . . .

D1: You're not gonna tell us . . .

D: . . . you don't wanna' tell us what happened . . .

McNally: No . . .

D: . . . now?

McNally: . . . not at this time. It's, it's too scary for me right now. I'd, I'd rather talk to a lawyer.

D: Alright.

McNally: I'm not trying to impede your investigation.

D: No, I understand.

McNally: I'll with "you's" . . . [sic]

D: I understand.

McNally: . . . no hassle . . . .

D: Okay, now, let me, let me explain to you what's happened. You've basically invoked your Right to have an attorney . . .

McNally: Right.

D: . . . okay? At this point, nothing that you say can be used against you in Court . . . in California because you have invoked your Right to have an attorney.

McNally: Right.

D: I still would like to know what happened now because — well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

So, basically, what they'll do is they'll play a game of "what's this case worth?" And they'll do "make, let's make a deal type thing."

McNally: I know.

D: What I wanna' know from you now is what you might tell me later so I know what you tell me later is the same as what you're gonna' tell me now because what you tell me later is gonna' be on the record.

D1: This is all on tape. This — what we're tellin' you. You've invoked your Rights. Everything from this point on . . .

D: Cannot . . .

D1: . . . regarding this case cannot be used against you. We're, we're making you the guarantee. It won't . . . you know, even though its on tape . . . .

McNally: Shut that thing off then.

D: Well, this is the record of what you're telling us. You, we . . .

D1: Yeah. It's also the record of you invoking your Rights. You want an attorney . . . . which is fine . . .

D: And it's — let me explain to you something else. Basically, what this does is validate for you and for the District Attorney that what you tell me now is what you're gonna' tell — hopefully, tell us later. 'Cuz the evidence will bear out, I think, what I, I already know.

So, once we start a tape, we don't turn it off. If you wanna' turn off the tape then we stop the conversation and, and we'll go ahead . . . .

D1: See . . .

D: . . . and do the process. I just wanted to explain to you and I'm not trying to be "hard ass" about this.

It's just the way I work. I know it's the way the District Attorney that I'm working with, uh, Richard Stone, works. We just — and if you were in our place, would you trust something that somebody told you after they talked to an attorney?

D1: It's like "black mail" with attorneys, Man. We know that.

D: I mean, I mean, first of all, if you could trust the attorney that you're working with he's gonna', and if you can work and if you tell him the truth, he gonna' work with you somehow to make a better deal, okay?

McNally: (no audible response).

D: They're, the deal is here. It's up to them . . .

D1: It's . . .

D: . . . it's up to them to talk about it. The only thing is, everything that falls after this — we'll go in one direction based on the physical evidence and the statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna' push it.

McNally: Right.

D: Okay, and fuck your attorney. It's just — I don't care about him anymore.

McNally: Yeah.

D: Okay. As far as I'm concerned, you know, they really mess up the system. I wanna' know now what

you're going to tell me later. It can't be used against you. We . . .

D1: This is your opportunity.

D: . . . told you that.

D1: And it's — this is your opportunity and it's not gonna' be used against you. If you . . .

D: If you want, you can write it out and start it with "The Detective told me this statement cannot be used against me . . ." I'll sign it and I'll make a xerox copy of it and you can have a xerox. It's up to you. I'm not tryin' to trick you here.

(pause)

McNally: Alright. I'll . . . and this can't be used against me.

D1: No, absolutely. It's right on there. It's not — we're promising you, it's not gonna' be used against you — in the case in chief — against you, okay? Just, this is for our edification of what happened.

McNally then proceeded to tell the detectives a very different, and far more incriminating story.

At his trial, McNally moved to suppress his incriminating statement, and the trial court granted the motion, prohibiting the use of the statement even for purposes of impeachment. After McNally was convicted, however, the prosecutor used the statement against McNally at sentencing to urge the court to consider as an aggravating factor McNally's assertions of self-defense in contradiction of his statement to the police.

James Bey Interrogation

Bey was also suspected of a brutal murder. Los Angeles police interrogated him while he was handcuffed to a bench at the police station. He was asked a few questions about the matter before he was given his *Miranda* warnings. Immediately thereafter, the following exchange occurred:

> Bey: Am I being charged with murder? If I'm being charged with murder, then I won't have another word to say until I have an attorney.
>
> D[6]: Is that — ah — your feelings? Do you — That's why I questioned you, do you wish to—
>
> Bey: *** if you read me those rights, you must be gonna charge me with something. So I'll wait and see what happens. I won't say another word until I have an attorney.
>
> D: Well, like you say yourself, James, you're a suspect.
>
> Bey: Well, if I'm being charged with something, I'd rather not have anything else to say until I have an attorney.
>
> D: Okay?
>
> Let me explain something to you, James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court.

[6]In the Transcript, "D" is Detective Bennett; "U" is an "unidentified detective," alleged elsewhere to be Detective Crosby. In the Transcript, Bey is denoted as "B" but his name is spelled out here for ease of understanding. Unintelligible passages in the tape of interview are denoted in the Transcript by asterisks: "***."

U: I think James is familiar with out *** outside Miranda. Are you familiar with that, James?

Bey: I don't — I don't know too much about the law. I'm just telling you I know to keep my mouth shut *** somebody to put me in jail.

D: Well, James, I'll tell you what, there's a lot of physical evidence which doesn't lie, James.

Do you know why we were so long before we got here to talk to you?

Bey: No, I don't. I know that you all were in my apartment looking around. I don't know what you were looking for.

D: Not only looking around. We were in your apartment with our what they call Scientific Investigation Division people, or personnel. These are experts in getting physical evidence.

Bey: Uh-huh.

D: And we got some very incriminating physical evidence, my friend.

Bey: ***

D: Stuff that can't be explained away.

Bey: Well, we'll have to see what happens. But I'm not gonna say nothing *** an attorney ***.

D: Why don't you tell me what happened that night?

Thereafter, Bey admitted that the murder victim had been in his apartment on the night she was killed, and that she had

previously "ripped him off" of small amounts of money. He also made various other statements about the evening in question, although he denied committing the murder. Bey stated in his deposition that Detective Bennett appeared angry at times during the interview, spoke loudly, made threatening gestures, and adopted a "condemnatory" tone.

At trial, Bey testified and his statement was used to impeach him. He was convicted of first degree murder. On appeal, the state court of appeal, after reviewing the uncontradicted evidence, stated: "We . . . are compelled to conclude that under these circumstances, appellant's statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony." *People v. Bey*, 27 Cal. Rptr. 2d 28, 31 (1993). The court held the error to be harmless, however, and affirmed the conviction. *Id.* at 32.

DISCUSSION

There can be little question that the insistence of the above interrogators on questioning after invocation of the right to silence and unequivocal requests for counsel violated the strictures of *Miranda* and did so intentionally. The defendants contend, however, that they are nevertheless entitled to qualified immunity because reasonable officers in their position could have believed that their interrogation did not violate "clearly established rights" of McNally and Bey. *See Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). Their contention is based on three propositions, all of which we reject: (1) that McNally and Bey have not alleged violation of a constitutional right; (2) that the right was not clearly established, in light of subsequent qualifications of *Miranda*; and (3) that the defendants could reasonably rely on training materials endorsing questioning "outside *Miranda*." We address these contentions in turn.

The Constitutional Right

[1] The first question is whether McNally and Bey have alleged the violation of a constitutional right at all. *See*

County of Sacramento v. Lewis, 118 S. Ct. 1708, 1714 n.5 (1998). The defendants contend that *Miranda* is a prophylactic rule, not a constitutional right. In the narrowest sense, this contention is correct: there is no constitutional right to the *Miranda* warnings themselves. *New York v. Quarles*, 467 U.S. 649, 654 (1984). But *Miranda* rights are brigaded with the right against self-incrimination and supply " 'practical reinforcement' for the Fifth Amendment right." *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). Indeed, the connection between *Miranda* and the constitutional right against self-incrimination is demonstrated by the fact that *Miranda* reversed a state court judgment, even though the Supreme Court observed that it "might not find the defendants' statements to have been involuntary in traditional terms." *Miranda*, 384 U.S. at 457. The Supreme Court has continued to enforce *Miranda* in both direct and habeas corpus review of state court judgments. *See, e.g., Minnick v. Mississippi*, 498 U.S. 146 (1990) (direct review); *Withrow v. Williams*, 507 U.S. 680 (1993) (habeas corpus). The Supreme Court's review of state judgments is confined, of course, to constitutional issues; it has no power to enforce mere supervisory rules on the States. *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991). Thus *Miranda* cannot be viewed entirely apart from the constitutional rights that it protects.

The defendants argue, however, that all of these cases deal with the *admission* of statements taken in violation of *Miranda*; they do not deal with a right against questioning apart from use of the statements at trial.[7] It is very difficult, however, to read *Miranda* that way:

[7]There is a certain perversity in this argument. The exclusionary rule is strong and unpleasant medicine that can keep probative evidence from the jury. The primary reason for employing the rule, with all its disadvantages, is that it is normally the most effective way to achieve the overarching goal of controlling police behavior that threatens the constitutional rights of individuals. *See, e.g., Elkins v. United States*, 364 U.S. 206, 217-18 (1960). It makes no sense to hold that other means of controlling police behavior ought not to be permitted because the exclusionary rule, though ineffective for the purpose, is in place.

> Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside of criminal court proceedings and serves to protect persons in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and *the exercise of those rights must be fully honored.*

Miranda, 384 U.S. at 467 (emphases added). This language focuses on rights of individuals *at interrogation.*

In any event, we have squarely rejected the defendants' contention in *Cooper v. Dupnik*, 963 F.2d 1220, 1251 (9th Cir. 1992) (en banc). "It is wrong . . . to relegate [the warning of the right to remain silent] to the status of 'only a prophylactic device': It is a prophylactic device, but it expresses a substantive right." *Id.* at 1240. In *Cooper*, we rejected a claim of qualified immunity asserted on behalf of officers who had interrogated a suspect who was never tried. We held that the request for an attorney is an "invocation of the substantive right to remain silent." *Id.* We held that the decision to interrogate Cooper despite his requests for an attorney, and to persist until Cooper broke down (even though he never confessed), was coercive and violated Cooper's constitutional rights. "It is irrelevant that Cooper's coerced statements were never introduced against him at trial. The Task Force's

wrongdoing was complete at the moment it forced Cooper to speak." *Id.* at 1237.[8]

[2] The defendants seek to distinguish *Cooper* on the ground that the nature of the questioning there was far more intimidating and coercive than that directed at McNally and Bey. They rely on *Cooper*'s point that a bare violation of *Miranda* is not enough to sustain a claim under § 1983:

> This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a *benign way, without coercion or tactics that compel him to speak.* What we do confront is a case laden with police misconduct that is "identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed."

Cooper, 963 F.2d at 1244 (emphasis added) (quoting *Tucker*, 417 U.S. at 444). But coercion has been claimed and the question whether it occurred remains to be tried; the district court held that McNally and Bey had raised a material issue of fact on that point, and denied summary judgment.[9] The district court's ruling is not surprising, in light of the fact that the state trial court suppressed McNally's statement even for impeachment purposes, and the state appellate court expressly concluded that Bey's statement was coerced. The district court was well aware of the distinction reflected in the above quotation from *Cooper*, but it also recognized that a failure to

[8]Thus McNally's and Bey's claims are not defeated by the fact that their statements may not have caused them harm at their trials; they seek redress for violations of their rights in the jail or stationhouse, not in the courthouse.

[9]McNally and Bey moved for summary judgment on their claim; the district court denied the motion. That denial of summary judgment, of course, is not subject to interlocutory appeal and is not before us. *See* 28 U.S.C. § 1291.

comply with *Miranda* can be viewed as an aggravation of other coercive tactics. *California Attys. for Criminal Justice v. Butts*, 922 F. Supp. 327, 336 & n.13 (C.D. Cal. 1996); *see Collazo v. Estelle*, 940 F.2d 411, 418 (9th Cir. 1991). Indeed, in recently holding a confession to have been coerced, we placed great emphasis on the fact that officers had ignored a request for counsel and had misrepresented that any statement thereafter made could not be used in court. *See Henry v. Kernan*, 177 F.3d 1152, 1158 (9th Cir. 1999). In any event, the nature and effect of the defendants' tactics in this case are yet to be resolved by the trier of fact. To the extent that the defendants' claim of immunity depends upon unresolved and genuine issues of fact, it is not appropriate for review on this interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995); *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

The Right is Clearly Established

[3] To be "clearly established" for the purpose of overcoming qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. *Miranda* could scarcely be more clear in stating that, once a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease*," and that if he "states that he wants an attorney, the interrogation *must cease until an attorney is present*." *Miranda*, 384 U.S. at 473-74 (emphases added). *See also Davis v. United States*, 512 U.S. 452, 458 (1994); *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991); *Minnick*, 498 U.S. at 152. The rule under these decisions is unmistakable. As we held in *Cooper*, "[t]here is no question that the Constitutional holding in *Miranda* is 'clearly established' law." *Cooper*, 963 F.2d at 1237.[10]

[10]Defendants also point out that *Cooper* was the first case that allowed recovery under § 1983 for interrogation "outside" Miranda. Accordingly,

[4] There is equally no question that reasonable officers in the defendants' position would know that their actions violated McNally's and Bey's *Miranda* rights. McNally and Bey both invoked their rights to speak to an attorney, in a manner indicating that they did not want the interrogation to proceed without such a consultation. The detectives deliberately ignored these requests. Yet, "[t]he *per se* aspect of *Miranda* was . . . based on the unique role the lawyer plays in the adversary system of criminal justice in this country." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). The detectives in McNally's case nevertheless attempted to discourage him from seeking counsel, implied that his situation would become much worse if he spoke with an attorney, and assured him that whatever he said could not be used against him in any way. After telling McNally several times that anything he said thereafter could not be used against him, one of the detectives inserted "in the case in chief," with no explanation of what that term meant. This unexplained qualification, which McNally has asserted he did not understand, cannot overcome the many untrue and unqualified statements that preceded it.[11]

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because *Cooper* was decided after these interrogations, the detectives argue that they were not on notice that their conduct was unconstitutional. This argument misunderstands both *Cooper* and the qualified immunity analysis. First, in *Cooper* we did not *establish* that this conduct is unconstitutional — we *recognized* it. We held that Cooper's rights were clearly established *at the time of his interrogation in 1986* — years before the interrogation of McNally and Bey. *Cooper*, 963 F.2d at 1237 ("Appellants knew [in 1986] that they were violating the Constitution.") Second, even without an analogous case, the Supreme Court "and our case law do not require that degree of specificity." *Hyland v. Wonder*, 117 F.3d 405, 412 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1166 (1998). It is not necessary that a case has previously declared the very conduct in question unlawful. We only require that the "unlawfulness must be apparent." *Id.*; *see also Anderson*, 483 U.S. at 640.

[11]We recognize that subterfuge may be used in interrogating suspects, but misstating the legal use that can be made of their statements is not a permissible form of subterfuge. *Miranda* requires that suspects be advised that their statements can be used against them, *see Miranda*, 384 U.S. at 469; it can hardly countenance false advice that the statement *cannot* be used against them.

In Bey's case, the interrogator told Bey that he was going to continue to ask him questions after he asserted his right to remain silent. He went on to advise Bey that because he didn't waive his rights, "[t]hat means we can't use [any subsequent statements] in court." *Bey*, 27 Cal. Rptr. 2d at 30. On appeal, the state court found this to be a "very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to appellant about the legal consequences of that violation." *Id.* In so continuing interrogation and misinforming McNally and Bey concerning the legal effects of that interrogation, the defendants clearly violated the *Miranda* imperatives, thereby creating a danger of coercion as well as a presumption of it. *See Oregon v. Elstad*, 470 U.S. 298, 307 n.1 (*Miranda* violation creates legal presumption of coercion). Nearly identical conduct was one of the major factors leading us to find a confession involuntary in *Henry*, 177 F.3d at 1157.

The defendants contend they could not have known that their conduct violated clearly established rights because of the Supreme Court's rulings that statements taken in violation of the *Miranda* safeguards may be used for purposes of impeachment. *See e.g., Oregon v. Hass*, 420 U.S. 714, 723-24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971). They also rely on *Tucker*, in which the Court permitted the testimony of a witness who had been identified by the defendant in an interview preceded by incomplete advice of his rights. *See Tucker*, 417 U.S. at 438; *but see Mincey v. Arizona*, 437 U.S. 385, 398 (1978) ("involuntary" statements not allowed for any purpose). Thus, the defendants argue that they could reasonably believe that it was lawful to continue to press their interrogation, with misleading assurances that any further statements made by McNally or Bey could not be used against them.

Harris and *Tucker* are easily distinguished from the present case; both involved interrogations that preceded the decision in *Miranda*. In *Tucker*, the Supreme Court relied on that

point, as well as on the fact that the police had acted "in complete good faith." *Tucker*, 417 U.S. at 447. The interrogation in *Hass* did succeed *Miranda*, however; the defendant was being driven to the police station, was given *Miranda* warnings, and said he wanted to call a lawyer. He was told he could do so when they arrived, but there was further conversation about the crime during the rest of the trip. *Hass*, 420 U.S. at 715-17. The defendant's statements were held to be admissible for impeachment. *Id.* at 723-24. *Hass* did not appear, however, to involve a conscious decision to continue interrogation in the hope of obtaining impeachment evidence. That officers might so behave was described as a "speculative possibility," but in any event the Court determined to follow *Harris* and permit use of the statement for impeachment. *Id.* at 723.

[5] The Supreme Court has never suggested, however, that these decisions dealing with the peripheral use of statements obtained in violation of *Miranda* somehow overcame *Miranda*'s imperatives concerning proper police procedure. Indeed, the Court has on several occasions, after *Harris*, *Tucker*, and *Hass*, restated those imperatives. In *Fare v. Michael C.*, for example, the Court said:

> Whatever the defects, if any, of this relatively rigid requirement that interrogation cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.

Fare, 442 U.S. at 718. The Supreme Court later canvassed the *Miranda* progeny in *Edwards v. Arizona*, 451 U.S. 477 (1981), stating:

> We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with

> *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Id. at 485. Again, in *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court observed that "[t]he *Edwards* rule thus serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Id.* at 682. *See also Davis*, 512 U.S. at 458; *McNeil*, 501 U.S. at 177; *Minnick*, 498 U.S. at 151.

[6] These cases indicate that there has been no weakening in *Miranda*'s mandates to protect the *rights* of suspects *during* custodial interrogation. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 99 (1975) (*Miranda* promulgated "safeguards to protect the . . . constitutional rights of persons subjected to custodial police interrogation."). In the face of these clear and unequivocal directions, reasonable officers in the position of defendants would have understood that they were violating the rights of McNally and Bey in interrogating them in the manner that they did. "Any minimally trained police officer should have known such pressure was improper and likely to produce involuntary statements." *Henry*, 177 F.3d at 1158.

Reliance on Training and Training Materials

[7] The defendants next contend that their reliance on training and training materials entitles them to qualified immunity. The district court rejected this argument holding that "following orders" will only insulate officers from liability when "reliance is objectively reasonable." *Butts*, 922 F. Supp. at 338. The court concluded that a "reasonable person could not reconcile the alleged practice of ignoring the assertion of *Miranda* rights with the commands of *Miranda*, and hence, reliance on the alleged policy cannot be objectively reasonable." *Id.*; *see also Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[I]ndividuals cannot always

be held immune for the results of their official conduct simply because they were enforcing policies or orders . . . .").

[8] The fact that Los Angeles and Santa Monica may have trained their police to violate the rights of individuals does not provide any defense for these officers. Their policy contradicts the safeguards provided by *Miranda*, and, at the very least, is in direct conflict with *Cooper*. Contrary to the assertions by the defendants, *Cooper* did not sanction this technique:

> The primary aggravating circumstance *is the Task Force's purpose* of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense — as Taylor said, "to help keep him off the stand." By forcing Cooper to talk in the police station, the officers hoped to prevent him from being able to do so in the courtroom. We note that their purpose was not just to be able to impeach him if he took the stand and lied, but to keep him off the stand altogether. *This tactic corrupts the doctrine* [the impeachment exception] established in *Harris*.

Cooper, 963 F.2d at 1249 (emphases added) (analyzing whether the police conduct "shocks the conscience"). Furthermore, training officers that inadmissible statements may nevertheless be used for impeachment purposes hardly sanctions this tactic of routinely and intentionally ignoring requests to speak to an attorney. For all of the reasons set forth in the preceding section of this opinion, a reasonable police officer should have known that this conduct was improper and violated the rights of McNally and Bey, whether or not the conduct was endorsed by training materials. Moreover, these officers had discretion over their interrogation methods. Their training did not require officers to interrogate "outside *Miranda*." They acted at their own election.

CONCLUSION

[9] The issue in this case is limited to whether these officers are entitled to qualified immunity as a matter of law. Accepting the facts as presented by McNally and Bey, as we must on summary judgment, *see Behrens*, 516 U.S. at 312-13, we conclude that the district court correctly ruled that the defendants were not entitled to qualified immunity. Officers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions.

The order of the district court denying summary judgment on the ground of qualified immunity is

AFFIRMED.

SCHWARZER, Senior District Judge, Dissenting and Concurring:

I respectfully dissent as to plaintiff James Bey and concur in the judgment as to plaintiff James McNally. *Anderson v. Creighton*, 483 U.S. 635 (1987), tells us that the discretionary acts of government officials are protected by qualified immunity unless

> the right the official is alleged to have violated . . . [has] been 'clearly established.' The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [That] is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640. In determining the validity of the qualified immunity claim, therefore, we must look at the state of the law at the time the conduct complained of occurred. *See Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1451 (9th Cir. 1995)

(qualified immunity upheld because right of action under Title IX not clearly established until Supreme Court so decided, subsequent to the complained of conduct).

I. BEY

The majority rests its decision on the proposition that "[o]fficers who intentionally violate the rights protected by Miranda [[by] insistence . . . on questioning after invocation of the right to silence and unequivocal requests for counsel] must expect to have to defend themselves in civil actions." Op. at 13409. Plaintiff James Bey was interrogated on March 8, 1991, by Officers Raymond Bennett and Michael Crosby. On February 6, 1991, one month earlier, a panel of this court decided *Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991) (*Cooper I*), *rev'd en banc*, 963 F.2d 1220 (9th Cir. 1992) (*Cooper II*). Cooper had brought a § 1983 action against police officers and others alleging various violations of his constitutional rights in connection with his interrogation while in custody. The opinion states that "Cooper contends that his continued interrogation, following his clear and unequivocal request to contact his attorney is a patent violation of the constitution." *Id.* at 1526. It then goes on to firmly reject this contention, reversing the denial of qualified immunity, stating:

> Although there is no case on point from our circuit, all out-of-circuit cases hold that a plaintiff may not, as matter of law, maintain a section 1983 action based upon the failure by the police to issue Miranda warnings. [Citations omitted.] . . . These cases are not precisely on point, since in the instant case the police gave the Miranda warnings but refused to allow Cooper to exercise his rights. But the reasoning of these cases does apply—since Miranda requirements are not a constitutional prerequisite, their violation cannot form the basis of a section 1983 suit. . . . Cooper can cite to no case allowing

> a section 1983 suit under the circumstances of his case.

Id. at 1527-28.[1]

Moreover, the Supreme Court had repeatedly held prior to March 1991 that Miranda's warning requirement is not a dictate of the Fifth Amendment. Thus, in *Connecticut v. Barrett*, 479 U.S. 523 (1987), the Court said:

> It remains clear, however, that this prohibition on further questioning—like other aspects of Miranda—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose. [Citation omitted.] By prohibiting further interrogation after the invocation of these rights, we erect an auxiliary barrier against police coercion.

Id. at 528. *See also Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (finding "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"); *New York v. Quarles*, 467 U.S. 649, 653 & n.3 (1984) (because Miranda is only a "prophylactic" rule, the Court considered a threat to public safety and acknowledged some "limited circumstances where the judicially imposed strictures of Miranda are inapplicable"); *Duckworth v. Eagan*, 492 U.S. 195, 201-03 (1989) (telling a suspect that an attorney will only be appointed if and when the suspect goes to trial does not render the notice constitutionally inadequate because the warnings mandated by Miranda are "procedural safeguards" and "prophylactic," not requiring administration in any exact

[1]The dissenting opinion did not take issue with this reasoning but read the allegations of the complaint as stating a claim for violation of rights secured by the Fifth, Sixth and Fourteenth Amendments. *Id.* at 1538.

form); *Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) (admitting a statement made without counsel and "not subject to proper Miranda" for impeachment purposes because the violations alleged "relate only to procedural safeguards"). Similarly, the Ninth Circuit prior to March 1991 did not recognize Miranda warnings as a cognizable constitutional right. "Miranda violations do not abridge the Fifth Amendment constitutional privilege against self-incrimination, but instead involve prophylactic standards laid down to safeguard that privilege." *United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987).

In declaring that "continued interrogation after a defendant invokes his Miranda right to counsel does not violate the Fifth Amendment," *Cooper*, 924 F.2d at 1528, and "that a violation of Miranda rights is not itself a violation of the constitution," *Id.* at 1527, the opinion in *Cooper I* was consistent with prior Supreme Court and Ninth Circuit law as it stood in 1991. Thus, the rationale of the majority opinion—that the officers violated a clearly established constitutional right by questioning Bey after he invoked his right to silence—cannot stand.[2] Bey argues, however, that this case is not about violation of the Miranda rules, but about coercion in violation of the Fifth Amendment. The question remains whether in 1991 there was clearly established law that the officers' interrogation violated the Fifth Amendment, i.e., when they continued the interrogation despite the suspect's repeated attempts to invoke his Miranda rights, asserted that they could not use his statements in court, and claimed that they possessed incriminating physical evidence. Op. at 13399-400. It is not enough for the court simply to say that such interrogation tactics may be found to

[2]It is true that in *Cooper II*, the court found that the officers knew in 1986 that they were violating the Constitution. 963 F.2d at 1237. Apart from the fact that the conduct involving Bey was substantially different from that involved in *Cooper*, the officers in *Cooper* did not have before them a court of appeals opinion rendered the preceding month that told them that violation of the Miranda rules was not a constitutional violation that could support a § 1983 claim.

be coercive; for qualified immunity to be overcome, the law to that effect must be clearly established. The majority's reliance on the Miranda rules on this issue is a bootstrap argument for, as noted, those rules do not establish a constitutional right. The Court's statement in *Anderson v. Creighton*, 483 U.S. 635 is apposite: "[I]f the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*[*v. Fitzgerald*, 457 U.S. 800 (1982)]." *Id.* at 639. *Anderson* requires that "in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640. Because there was no such law in 1991, defendants' qualified immunity motion as to Bey's claims should have been granted.

II. McNALLY

Plaintiff James McNally was interrogated by Officers Ray Cooper and Shane Talbot on March 2, 1993. *Cooper II* had been decided on May 5, 1992, ten months earlier. In *Cooper II*, an *en banc* panel of this court reversed *Cooper I* and found interrogation "that was involuntary *because it was actively compelled and coerced* by law-enforcement officers during in-custody questioning" can form the basis for a § 1983 action against the police officers who interrogated him. *Cooper*, 963 F.2d at 1243. The limits of *Cooper II*'s holding, as relevant to this case, are encapsulated in the following statement: "This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak." *Id.* at 1244. It is plain, therefore, that *Cooper II* does not establish law that supports the majority opinion's broad rationale that "the insistence of the . . . interrogators on questioning after invocation of the right to silence and unequivocal requests for counsel violated the strictures of Miranda" and thereby barred qualified immunity. Op. at 13399. Before a constitutional violation can be found, there must be more than a Miranda infraction—there

must be coercive tactics that compel the suspect to speak in violation of the Fifth Amendment. *Id.* at 1243-1244.

The question is what tactics, in 1993, were clearly established by law to be coercion violating the Fifth Amendment. The majority summarizes the conduct of the officers as "attempt[ing] to discourage [McNally] from seeking counsel, impl[ying] that his situation would become much worse if he spoke with an attorney, and assur[ing] him that whatever he said could not be used against him in any way." Op. at 13404.[3] In July 1991, this court held substantially similar questioning of a suspect to be coercion violating the Fifth Amendment. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (*en banc*). The critical colloquy between Detective Destro and defendant Collazo, after Collazo asked if he could speak with a lawyer, went as follows:

> Destro:—Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police. Then it might be worse for you.

[3]Note that Bey's case is different, both on its facts and on its timing. The officers interrogating Bey in 1991 did not denigrate the role of counsel or threaten Bey with harsher treatment as a result of his invocation of his right to remain silent. In contrast, in McNally's interrogation, the detectives repeatedly indicated they would not trust McNally if he chose to consult a lawyer:

> Detective: —[Y]ou have invoked your right to have an attorney.
>
> McNally: —Right.
>
> Detective: —I still would like to know what happened now because—well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

The detectives went on to demean the role of counsel at least four more times, saying attorneys "really mess up the system," "fuck your attorney," "It's like black mail with attorneys, man," and "would you trust something that somebody told you after they talked to an attorney?" McNally proceeded to confess to the murder.

Collazo:—Pardon me?

Destro:—Then it might be worse for you.

Id. at 414.[4] The court held that "demean[ing] the pretrial role of counsel," *id.* at 418, in an "attempt to discourage Collazo from speaking to a lawyer," *id.* at 416, "l[eading] Collazo to believe he could reap some legal benefit by excluding defense attorneys from the pre-trial process," *id.* at 418, and "attempt[ing] in the police station to impose a penalty on Collazo's choice to remain silent amount[ed] to a serious infringement of Collazo's Fifth Amendment right." *Id.* at 417. The court concluded that "Officer Destro's overreaching behavior violated not only Miranda, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses." *Id.* at 419.

Because it was clearly established, prior to McNally's interrogation, that denigrating the role of counsel and threatening to impose a penalty on a suspect's exercise of his Fifth Amendment rights constitutes coercion violating the Fifth Amendment, Officers Cooper and Talbot are not entitled to qualified immunity. I therefore concur in the judgment affirming the denial of qualified immunity.

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[4]It was clearly established law in 1993 that a detective during interrogation cannot threaten a suspect with harsher treatment as a result of a suspect's decision to remain silent and not cooperate. *See United States v. Tingle*, 658 F.2d 1332, 1336, n.5 (9th Cir. 1981) ("[I]t is permissible for an interrogating officer to represent, under some circumstances, that the fact that the defendant cooperates will be communicated to the proper authorities, the same cannot be said of a representation that a defendant's failure to cooperate will be communicated to a prosecutor. Refusal to cooperate is every defendant's right under the fifth amendment."). *See also United States v. Guerrero*, 847 F.2d 1363, 1366 & n.2 (9th Cir. 1988) (noting that recommendations of leniency as a result of cooperation are appropriate, but "threatening to inform the prosecutor of a suspect's refusal to cooperate violates her fifth amendment right to remain silent.").

APPENDIX B

I Hereby Certify That This Document Was Served By United States Mail Postage Prepaid, To All Counsel Or Parties At Their Respective Most Recent Address Of Record In This Action On This Date
Dated: Aug. 26, 1997

Deputy Clerk

Filed
Clerk, U.S. District Court
Aug. 26, 1997
Central District of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CV 95-8634-ER (JGx)

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, et al.,
Plaintiffs,
v.
JAMES BUTTS, et al.,
Defendants.

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT ARGUED AUGUST 11, 1997

On August 11, 1997, the following motions came on for hearing before the Honorable Edward Rafeddie in Courtroom 1: Plaintiffs' Motion for Summary Judgment, the Santa Monica Defendants' Motion for Summary Judgment, and the Los Angeles Defendants' Motion for Summary Judgment (joined by the Santa Monica Defendants). Having read and carefully considered the papers filed in support of and in opposition to these motions, as well as the two briefs filed by amicus curiae, and having considered oral argument of counsel, the Court now HEREBY RULES as follows:

[1] On a motion for summary judgment, the Court must view all facts and draw all inferences in the light most favorable to the non-moving party.

[2] The Court DENIES Plaintiffs' and all Defendants' motions for summary judgment on Plaintiffs' claim that Defendants violated their Fifth Amendment right to be free from self-incrimination during custodial interrogation. The Court has carefully considered *Miranda v. Arizona*, 86 S.Ct. 1602 (1966), and its progeny, as well as the Ninth Circuit's en banc decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), cert. denied, 113 S.Ct. 407 (1992). The Court believes that there is a genuine issue of material fact as to whether or not Plaintiffs McNally and Bey were coerced into speaking by police officers

during custodial interrogation, in violation of Plaintiffs' Fifth Amendment right against self-incrimination. As *Cooper* makes clear, a mere violation of *Miranda* is not, without more, a violation of the Fifth Amendment. After invocation, detectives may still speak with a suspect "in a benign way, without coercion or tactics that compel him to speak." *Cooper*, 963 F.2d at 1243-44. However, when *Miranda* measures are ignored, a suspect's Constitutional rights are "directly affected." *Collazo v. Estelle*, 940 F.2d 411, 418 (9th Cir. 1991), cert. denied, 112 S.Ct. 870 (1992). A failure to comply with *Miranda* can be viewed as an aggravation of other coercive tactics. *Id.*

[3] Absent proper safeguards, custodial interrogation is fraught with "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 86 S.Ct. at 1624. In McNally's case as well as in Bey's case, the detectives purposely continued to question Plaintiffs after they had invoked their rights to silence and to counsel under *Miranda*. The detectives interrogating McNally explicitly demeaned the role of defense counsel when McNally invoked his right to an attorney. In each case, the interrogating detectives told Plaintiffs that their post-invocation statements could not be used against them. In each case, however, Plaintiffs' statements were

ultimately used against them by prosecutors.[1] These facts raise a genuine issue of material fact as to whether or not the detectives' questioning was coercive or merely benign, in the language of *Cooper*, 963 F.2d at 1243-44.[2] The Fifth amendment claim, therefore, is appropriate for resolution before a jury, on a fully developed record.

[4] Plaintiffs and all Defendants also move for summary judgment on Plaintiffs' claims that Defendants violated their Fourteenth Amendment substantive due process rights (1) to be free from conduct overbearing their will, and (2) to be free

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[1] Plaintiff McNally filed a successful motion to suppress the use of his statement by the prosecution at trial for the purpose of impeachment. However, McNally's statement was used against him by the prosecution at his sentencing hearing. Plaintiff Bey's statement was used against him at trial for the purpose of impeachment. In neither McNally's case nor in Bey's case were the statements used by the prosecution in its case-in-chief.

The California Court of Appeal has ruled that Plaintiff Bey's post-arrest statement taken during custodial interrogation and in violation of *Miranda* was "coerced and involuntary," but that admission of the statement at trial to impeach Bey was harmless error in light of the overwhelming evidence of Bey's guilt. *People v. Bey*, 27 Cal. Rptr. 2d 28, 31-32 (Cal. App. 2 Dist. 1993).

[2] The Court views the Defendants' after-the-fact arguments that the detectives somehow conferred "de facto use immunity" on these suspects to be without merit.

from behavior that "shocks the conscience" during interrogation.

[5] The Court DEFERS RULING on the Fourteenth Amendment claim for conduct overbearing the will. The parties are referred to *Albright v. Oliver*, 114 S.Ct. 807 (1994), and should consider whether, in light of *Albright*, Plaintiffs' generalized Fourteenth Amendment substantive due process claim must yield to the Fifth Amendment claim, which appears to provide the "explicit textual source of constitutional protection against . . . government behavior" at issue in the present case. *Albright*, 114 S.Ct. at 813. Accordingly, the parties may file any appropriate motions within ten (10) days of the date of this Order.

[6] The Court GRANTS all Defendants' motions for summary judgment on the Fourteenth Amendment "shocks the conscience" claim, and DENIES Plaintiffs' motion for summary judgment on that claim. There is no evidence of behavior "shocking to the conscience" in either case, or of conduct that is "intentional, unjustified, brutal, and offensive to human dignity," or that constitutes force that is "brutal" and "offends even hardened sensibilities." *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986).

[7] The Court DENIES the Santa Monica and Los Angeles detectives' motions for summary

judgment on the basis of qualified immunity. The Court believes this defense is foreclosed by the analysis set forth in *Cooper v. Dupnik*, 963 F.2d at 1250-51. The law that police officers may not coerce criminal suspects into making incriminating statements during custodial interrogations is "clearly enough established to alert a reasonable officer to its constitutional parameters." See *Miranda*, 86 S.Ct. at 1624; *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996). Defendants have articulated no reason for this Court to alter its preliminary denial of the qualified immunity defense, as articulated in the Court's Memorandum Opinion issued in connection with the motion to dismiss. *CACJ v. Butts*, 922 F.Supp. 327, 337-38 (C.D. Cal. 1996).

[8] The Court DENIES Plaintiffs' and all Defendants' motions for summary judgment on Plaintiffs' claims under *Monell v. Dep't of Social Services*, 98 S.Ct. 2018 (1978). There is a genuine issue of material fact as to whether or not the Santa Monica and Los Angeles Police Departments have a custom or policy of denying criminal suspects their Fifth Amendment right against self-incrimination during custodial interrogations through coercive questioning. Although the "outside *Miranda*" training materials relied upon by each Department inevitably recommend that detectives proceed in a non-coercive fashion, the Court believes that a jury should be left to draw its

own inferences as to whether there was a policy or custom to violate Fifth Amendment rights, and whether the "outside *Miranda*" training materials and classes reflected deliberate indifference to constitutional rights. For the same reasons, the Court DENIES Chief Butts' motion for summary judgment in his individual and official capacities.

[9] The Court DENIES the Santa Monica Defendants' motion for summary judgment on Plaintiff McNally's damages claims. Plaintiff McNally has stated claims for money damages that may go to a jury, and the Court does not believe that a finding on Plaintiff's behalf would necessarily imply the invalidity of his conviction or sentence under *Heck v. Humphrey*, 114 S.Ct. 2364 (1994).

[10] The Court also DENIES WITHOUT PREJUDICE the Santa Monica Defendants' motion for summary judgment on the ground that Plaintiff McNally has improperly invoked the Fifth Amendment privilege in these civil proceedings in response to discovery requests concerning the underlying murder case. The Court does not believe that Defendants have shown prejudice at this time.

[11] The Court DENIES Plaintiff McNally's motion to strike the declarations of Marianne Fullove, Raymond Hill, Jeffrey Semow, Joel Carey, and Richard Tyler; as well as Exhibits H, L, M, N, and Q. There are conflicting allegations as to

when this admittedly late-disclosed evidence became available to Plaintiff. More importantly, the Court did not rely on these materials in reaching its ruling. The Santa Monica Defendants' objections to the amicus brief of the National Association of Criminal Defense Lawyers are OVERRULED.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by telefax or by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: Aug. 26, 1997

/S/Edward Rafeedie
EDWARD RAFFEDIE
Senior United States District Judge

APPENDIX C

Filed
October 15, 1997
Clerk, U.S. District Court
Central District of California
By Deputy

Entered
Clerk, U.S. District Court
October 16, 1997
Central District of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CV 95-8634-ER (JGx)

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, et al.,
Plaintiffs,
v.
JAMES BUTTS, et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION; DENYING PLAINTIFFS' MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL; AND GRANTING DEFENDANTS' REQUEST FOR STAY PENDING APPEAL ON QUALIFIED IMMUNITY ISSUE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

On September 29, 1997, the following motions came on for hearing before the Honorable Edward Rafeedie in Courtroom 1: the Los Angeles Defendants' Motion for Summary Adjudication (joined by the Santa Monica Defendants), the Plaintiffs' Motion for Certification for Interlocutory Appeal (joined in part by all Defendants), and the Los Angeles Defendants' Request for Stay Pending Appeal Re: Qualified Immunity (contained within its Opposition to Plaintiff's Motion for Certification). Having read and carefully considered the papers filed in support of and in opposition to these motions, and having considered oral argument of counsel, the Court now HEREBY RULES as follows:

[1] The Court GRANTS all Defendants' motion for summary adjudication regarding Plaintiffs' Fourteenth Amendment Substantive Due Process claim for conduct "overbearing the will."

[2] The sole issue in this motion for summary adjudication concerns a question of law, and requires the Court to determine whether a cognizable Fifth Amendment claim for self-

incrimination bars a concomitant Fourteenth Amendment Substantive Due Process claim for conduct "overbearing the will." In deciding whether the former precludes the latter, the Court considered the Ninth Circuit's decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), the United States Supreme Court's decision in *Albright v. Oliver*, 114 S. Ct. 807 (1994), and other cases independently researched by the Court.

[3] In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), the Ninth Circuit sitting *en banc* stated in a footnote that "[b]ecause statements of an accused continue to be analyzed under *both* the Fifth and Fourteenth Amendments, and because *Rochin*'s theory of § 1983 liability is still viable, Cooper is entitled to avail himself of all three theories." *Id.* at 1244 n.11 (emphasis added). The Ninth Circuit's decision in *Cooper* remains the last word on the viability of Fourteenth Amendment Substantive Due Process claims in cases where the Court finds a cognizable Fifth Amendment claim for self-incrimination occurring during an interrogation. The question this Court address is whether the statement in *Cooper*'s footnote is still good law after the Supreme Court's decision in *Albright v. Oliver*. The Court ultimately concludes that it is not.

[4] *In Albright v. Oliver*, 114 S. Ct. 807 (1994), the plaintiff brought a Section 1983 lawsuit claiming that a malicious prosecution

deprived him of Substantive Due Process under the Fourteenth Amendment . . . to be free from criminal prosecution except upon probable cause." *Id.* at 810-11. A plurality of the United States Supreme Court held that to the extent the Constitution gave rise to a malicious prosecution claim, the plaintiff's right to redress the grievance fell solely within the more specific provisions of the Fourth Amendment and not under the more generalized Substantive Due Process protections of the Fourteenth Amendment. *Id.* at 813. Although the Court's decision was rendered by a plurality, its general principles, explained in the paragraphs below, are held by a majority of the Court.

[5] As a general matter, the Supreme Court has "always been reluctant to expand the concept of Substantive Due Process because the guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity. *Albright*, 114 S. Ct. at 812.

[6] Thus, the Supreme Court has stated that claims alleging Substantive Due Process violations are often more appropriately analyzed under the more specific guarantees of the various

provisions of the Bill of Rights. *Id.* at 813. "Where a particular amendment [to the Constitution] provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, [and] not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* (citing *Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989)) (internal quotation marks omitted). The Court should "reverse[] due process for otherwise homeless substantial claims" so as to avoid "unnecessary duplication in constitutional adjudication." *Albright*, 114 S. Ct. at 820 (Souter, J., concurring).

[7] The Ninth Circuit recently adopted the narrow Substantive Due Process philosophy enunciated in *Albright* in an *en banc* decision entitled *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). In *Armendariz*, the owners of low-income housing properties brought a 42 U.S.C. § 1983 action against city officials, alleging that conducting sweeps and over-enforcing housing codes for the purpose of relocating criminals violated Substantive Due Process and Equal Protection. The Ninth Circuit rejected the Substantive Due Process claim on the ground that the Fourth and Fifth Amendments provided protection against the kind of governmental behavior challenged in the case. In doing so, the Court referred to *Albright v. Oliver* and stated that "[s]ubstantive due process analysis has no place in

contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Id.* at 1326. The Ninth Circuit would not allow the plaintiff to "seek relief under multiple constitutional theories" where one of the theories involves Substantive Due Process. *Id.* Although the decision in *Armendariz* does not squarely address Fifth Amendment self-incrimination claims, it certainly calls into question the validity of *Cooper*'s statement in footnote 11.[1]

[8] In the present case, the Fifth Amendment to the United States Constitution provides explicit protection for the alleged government conduct. The Fifth Amendment states in relevant part that "no person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The language of the Fifth Amendment in no uncertain terms

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[1] The Court also notes that a number of decisions in other jurisdictions have already extended *Albright*'s preclusion principle to other amendments to the Constitution. See, e.g., *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (extending to First Amendment free speech and association claim); *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1433 (C.D. Ill. 1996) (same); *Patel v. Penman*, 103 F.3d 868, 875 (9th Cir. 1996) (extending to Fifth Amendment Takings Clause); *Holman v. Page*, 95 F.3d 481, 485 (7th Cir. 1996) (extending to Eighth Amendment cruel and unusual punishment).

protects persons from the same kind of government conduct alleged in this case, namely compelling one to give testimonial, self-incriminating evidence. Plaintiffs' generalized Substantive Due Process claim does not add a "substantive increment" to the protection available under the Fifth Amendment. Quite the contrary, Plaintiffs' claim for conduct "overbearing the will" rings remarkably similar to the first requirement of a Fifth Amendment claim, that the person's testimony be "compelled." In this sense, the protections of the Fifth Amendment subsume any protections afforded by the Fourteenth Amendment.

[9] Altogether, in light of the Supreme Court's decision in *Albright* and its progeny, and the clear and unequivocal protections afforded by the Fifth Amendment for the grievance claimed in this case, the Court concludes that Plaintiffs' Fourteenth Amendment Substantive Due Process claim cannot proceed as a matter of law.

[10] The Court DENIES any and all requests for certification of issues for interlocutory appeal. The Ninth Circuit has set a high hurdle for granting 28 U.S.C. § 1292(b) certification, noting that it is only to be used in "extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation. It was not intended to provide review of difficult

rulings in hard cases." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966).

[11] This case is not so extraordinary so as to merit sending any issues on appeal. Many of the issues sought to be certified are ones that this Court has already ruled involve triable issues of fact. Being that the Ninth Circuit Court of Appeals will not be able to address these issues until a full record is first created by the District Court, certifying issues of fact to the Ninth Circuit will not "materially advance the ultimate termination of the litigation." Moreover, any remaining issues involving questions of law, do not pose, contrary to the parties' contentions, "substantial ground for difference of opinion." Although the parties may disagree with the Court's rulings on these issues of law, the resolution of each issue was supported by established precedent. See *CACJ v. Butts*, 922 F. Supp. 327 (C.D. Cal. 1996); Aug. 26, 1997 Order Re: Summary Judgment.

[12] Finally, the Court GRANTS the individual Defendant Police Officer's Request for a Stay of this Court's proceedings pending the outcome on appeal on the issue of qualified immunity.

[13] Each individual defendant may immediately appeal the Court's denial of summary judgment on qualified immunity. *Behrens v.*

Pelletier, 116 S. Ct. 834, 838-39 (1996). Generally, such an appeal operates to automatically stay the trial in the District Court. *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Behrens*, 116 S. Ct. at 841. The District Court need not stay proceedings, however, if the District Court certifies in writing that the immunity appeal is frivolous. *Id.* But the power to certify an appeal is frivolous "must be used with great restraint." *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989).

[14] The Court finds that the issue of qualified immunity in this case is not frivolous. A government official is "entitled to qualified immunity only if he is performing discretionary functions and if his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). In the present case, a colorable argument may be made that it is not clearly established that questioning "outside" of *Miranda*, where *Miranda* warnings were actually given, violates the Fifth Amendment to the Constitution.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by telefax or by United

States mail, copies of this Order on counsel for the parties in this matter.

Dated: Oct. 15, 1997

/S/Edward Rafeedie
EDWARD RAFEEDIE
Senior United States District Judge

APPENDIX D

[Parties' Stipulation of Facts Regarding Training Methods from Ninth Circuit Excerpt of Records, pp.254-256]

STIPULATION

Plaintiff James McNally and Defendants City of Santa Monica, James T. Butts, Jr., Ray Cooper and Shane Talbot stipulate to the following facts:

1. Police Departments in the State of California are regulated by the Commission on Peace Officer Standards and Training (POST). California Penal Code § 13500 et seq. The POST commission establishes minimum standards for training of peace officers in the State.

2. The Santa Monica Police Department is a relatively small department with approximately 195 sworn police officers. Unlike some of the larger departments in the State of California, Santa Monica's police department does not have its own police training academy. All police officers receive POST certified academy training and attend the City's 20 week field training program.

3. Every Santa Monica police officer continues to receive training on a wide variety of subjects throughout his or her career with the City of Santa Monica. The type and substances of

training depends upon the officer's rank and assignment. Training includes formal classroom training, rollcall training and training bulletins. The training bulletins are prepared by the training department and approved by the Chief of Police prior to circulation within the department. Most of the formal classroom training is provided by sources outside of the Department such as colleges, institutes, private providers, other police agencies and organizations.

4. The Santa Monica Police Department does not provide in-house classroom training on interrogation techniques. The Department relies upon the training provided at the POST accredited academy and specialized advanced courses offered by outside organizations. Some of these advanced courses are POST accredited and some are not. The Department does not review or approve the substantive content of the training provided in the advanced training courses. If the course is POST accredited, the Department relies on the oversight provided by POST. If the course is not POST accredited, the Department considers the reputation of the course, the course instructors and the course syllabus, if available, in determining whether or not to send police personnel to the course.

5. The Santa Monica Police Department promotes officers to detective positions in the Office of Criminal Investigations based on written

applications and interviews. Detectives conduct virtually all of the custodial interrogations related to felony crimes. Detectives receive advanced instruction for special assignments such as homicide, rape, arson and narcotics. Their training includes advanced instruction in custodial interrogation.

6. Ray Cooper has been employed with the Santa Monica Police Department since 1976. Sergeant Cooper is the detective currently in charge of the Office of Criminal Investigations and held that position since 1991. Prior to 1991, Detective Cooper worked in the Office of Criminal Investigations for 10 years. Sergeant Cooper's duties currently include investigating and supervising investigations related to homicides, deaths, robbery, missing persons, kidnaping, rapes and a variety of other major assaults. His duties also include reviewing reports prepared by detectives in the office of Criminal Investigations, including reports on custodial interrogations conducted by other detectives.

7. Shane Talbot has been employed with the Santa Monica Police Department since 1973. Detective Talbot is currently assigned to the Office of Criminal Investigations and has worked as a detective in that division since 1979.

8. Prior to March 1993, Detectives Cooper and Talbot attended advanced training

courses related to investigative techniques, including custodial interrogation. None of these courses were taught by the Santa Monica Police Department. The instructors at some of these courses taught Detectives Cooper and Talbot that it was permissible to question a custodial suspect after he or she has asserted his or her *Miranda* rights. Pursuant to their training, Sergeant Cooper and Detective Talbot have questioned custodial suspects after they have asserted their *Miranda* rights.

9. Sergeant Cooper and Detective Talbot investigated the homicide involving James McNally. On March 2, 1993, Detectives Cooper and Talbot interviewed Mr. McNally, who was in police custody in Flagstaff, Arizona. A true and correct copy of the transcript of the interview is attached as Exhibit "A".

10. Attached as Exhibit "B" is a copy of a portion of the Santa Monica Police Department's Policy and Procedure Manual related to *Miranda* admonishments. This policy was in effect in March 1993.

11. There are three training bulletins signed by Santa Monica Chief of Police James T. Butts related to *Miranda*. All three bulletins were signed after March 1993, when Sergeant Cooper and Detective Talbot interviewed McNally. Attached as Exhibit "C" is a true and correct copy

of Santa Monica Police Department Training Bulletin, No. 94-02 dated February 2, 1994. Attached as Exhibit "D" is a true and correct copy of Santa Monica Police Department Training Bulletin, No. 95-07 dated January 21, 1995. Attached as Exhibit "E" is a true and correct copy of Santa Monica Police Department Training Bulletin, No. 95-19 dated September 7, 1995.

12. Mr. McNally did not file a personnel complaint pursuant to California Penal Code §§ 832.5 and 832.7 against Sergeant Ray Cooper or Detective Shane Talbot related to the interrogation. And, the Santa Monica Police Department did not discipline either Sergeant Cooper and Detective Talbot as a result of the interrogation.

DATED: April 18, 1997

By: /s/Charles D.Weisselberg
Charles D. Weisselberg

Attorney for Plaintiff
James McNally

By: /s/Jeanette Schachtner
Jeanette Schachtner

Attorneys for Defendants
City of Santa Monica, James T. Butts, Jr.,
Ray Cooper and Shane Talbot

APPENDIX E

[Declaration of Supervising Deputy Attorney General Responsible for Police Officer Training and Author of Department of Justice Legal Sourcebook for the State of California from Ninth Circuit Excerpt of Record pp. 244-249]

DECLARATION OF JOEL E. CAREY

I, JOEL E. CAREY, declare from my own personal knowledge and if called as a witness could and would competently testify to the following:

1. I am a Deputy Attorney General in the California Attorney General's Office in Sacramento and have worked in the Criminal Law Division for approximately 25 years, including 15 years as a Supervising Deputy Attorney General.

2. In addition to my primary responsibility of handling felony appeals for the People before the state's appellate courts, I have had many, ongoing assignments relating to the training of police officers in the areas of search and seizure law and interrogation law. More particularly, I have conducted P.O.S.T. approved training classes and seminars on these topics throughout the state for over 20 years and have been the featured speaker for the past 15 years at the Legal Update seminars sponsored each fall by the California Peace Officers Association. I have also been solely

responsible for the content of the Peace Officers Legal Sourcebook since its inception in 1984. The Legal Sourcebook is a Department of Justice Publication, available in three formats (loose-leaf, computerized, and abbreviated "Field Guild"), which is updated six times a year and is used for training at numerous police academies and colleges throughout the state, as well as by tens of thousands of individual peace officers who want to stay abreast of the law.

3. Within the area of interrogation law, there has been discussion during recent years concerning the issue of "intentional violations" of *Miranda*. Specifically, the discussion relates to continuing to ask questions of (i.e., to "interrogate") a suspect who is in "custody" (i.e., who has either been arrested or subjected to equivalent restraints on his freedom of movement), even though the suspect has invoked his *Miranda* right to silence or his *Miranda* right to counsel.

4. On this topic, I have taught, and continue to teach as follows: As the U.S. Supreme Court has repeatedly stated, the two *Miranda* rights (silence and counsel) are not, themselves, constitutional rights. (*Miranda*, *Tucker*, *Edwards*, *Quarles*, *Duckworth*, *Burbine*, *Davis*). Rather, they are no more than suggested guidelines or recommended procedures on how the police may obtain a statement which will be admissible at trial without violating the suspect's Fifth

Amendment right against self-incrimination. (*Miranda.*)

5. The Fifth Amendment right against self-incrimination is, of course, a constitutional right, but it is a trial right. (*Verdugo-Urquidez*) This means that it is violated, if at all, at trial, i.e., by a judge when he or she admits a statement which was obtained without complying with the *Miranda* safeguards.[1]

6. The Sixth Amendment right to counsel is also a constitutional right. However, it does not attach until the commencement of adversary proceedings (i.e., indictment or the suspect's first court appearance). It serves an entirely different purpose than *Miranda*, and, in general, has absolutely nothing to do with *Miranda*. (*Kirby, Gouveia, Davis*).

7. Because "the prophylactic rules of *Miranda*" are not constitutional rights, and because the whole purpose behind the *Miranda* decision is how an admissible statement may be obtained, the failure to comply with *Miranda*

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[1] As a *trial* right, the Fifth Amendment privilege against self-incrimination stands in stark contrast to the Fourth Amendment right to be free from unreasonable searches and seizures, which exists and all times and places and which is therefore violated "in the field" by an officer who undertakes an unreasonable search or seizure.

results in only one "penalty", namely, a statement that is *not* admissible at trial--at least where the non-compliance with *Miranda* was non-coercive, i.e. where the statement was not involuntary/unreliable through the use of force, threats or promises.

8. Because non-coercive non-compliance with *Miranda* does not involve a constitutional right, there is likewise no civil rights violation, nor any basis for applying *Wong Sun's* "fruit of the poisonous tree" doctrine (*Elstad*). "We decline to hold that the murder weapon should be suppressed as a 'fruit' of a *Miranda* violation." (*Cherry*, 794 F.2d 1040, 1044 (5th Cir. 1986).) "Although the statement itself must be excluded, the physical evidence produced as a result of it is not rendered inadmissible simply because of the *Miranda* violation." (*Henley*, 984 F.2d 1040, 1044 (9th Cir. 1993).) "[T]he United States Supreme Court has stated unequivocally, in *Elstad* and *Tucker*, that a non-coercive *Miranda* violation is not a constitutional violation." (*Whitfield*, 46 Cal.App.4th 947, 957 (1996).)

9. On the other hand, all statements must be "voluntary" in order to be admissible at trial. (*Mincey*, *Benson*) Accordingly, if the police obtain a statement through the use of force, threats or promises, there is a "due process" issue under the

Fourteenth Amendment.[2] If the technique was such as to render the statement involuntary and unreliable, i.e., if the suspect's free will was "overborne" by the police conduct so that the statement was "no longer the product of a rational intellect and free will," then there has been a "substantive" due process violation, and the statement is inadmissible for any purpose. (*Blackburn*, *Mincey*, *Cahill*).

If, on the other hand, the statement was obtained as the result of a non-coercive "promise" (for instance, that the statement will not be used against the suspect), then *if and when the statement is admitted*, there has been only a "procedural" due process violation. The violation results from the inherent unfairness in the State going back on its word even though the promise would not result in an unreliable statement.

In short, "the type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of Section 1983 relief." (*Daniels v. Williams*, 474 U.S. 327, 337 (1986)).

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[2] Declarant recognizes that the Fifth Amendment also contains a "due process" clause but, for the sake of clarity, will refer only to the Fourteenth Amendment when discussing "due process".

10. In *Harris*, 401 U.S. 222 (1971), the Supreme Court ruled that a statement obtained in non-compliance with *Miranda* can nevertheless be used for impeachment. And in *Hass*, 420 U.S. 714 (1974), non-compliance took the form of putting off the suspect until after he made incriminating statements, even though the suspect had said he wanted an attorney. The Supreme Court followed *Harris* and ruled that the statements were nevertheless admissible for impeachment since the officer had done nothing to render the statement involuntary and untrustworthy:

> One might concede that when proper Miranda warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in *Harris*, and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care

> of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness. (*Hass* at p. 723)

11. Analytically, since *Miranda* rights are not constitutional rights, it should not make any difference how, or in what manner, the police fail to comply with *Miranda* (excluding any Fourteenth Amendment issue). The result is always the same: Non-coercive non-compliance with *Miranda* renders a statement inadmissible in the case in chief, but leaves it admissible for impeachment purposes. (*Harris*, *Hass*).

12. Likewise, it should not matter why the police did not comply with *Miranda*. The subjective thinking and/or motivation of officers should be as irrelevant under interrogation law as it is under search and seizure law, indeed, probably *less* relevant since no constitutional right is directly involved.

13. As an educator, I do not take a position, one way or another, whether police should or should not ignore a suspect's invocation of *Miranda* rights. Rather, I provide training on established law and apply the relevant principles to various fact patterns, including this one.

14. Attached to this declaration is an excerpt that I wrote and that is contained in the Legal Sourcebook.

I declare under penalty of perjury, pursuant to the laws of the State of California that the foregoing is true and correct.

This Declaration was signed on the May 1, 1997 at Sacramento, California.

/s/Joel Carey
JOEL CAREY
Deputy Attorney General

APPENDIX F

[Declaration of State Certified Trainer in Legal Aspects of Interrogation Law from Ninth Circuit Excerpt of Record at pp. 232-243]

DECLARATION OF RAYMOND HILL

I, RAYMOND HILL, declare and if called as a witness could and would competently testify to the following facts of my own personal knowledge.

1. I am currently a professor of criminal justice and public administration at Santa Rosa Jr. Community College and have held that position since 1981.

2. I received my Bachelor's degree in 1974 and my Master's degree in 1977 from Golden Gate University in San Francisco. I have also completed post graduate work in education.

3. I have taught California police officers and deputy sheriffs about the legal aspects of Miranda for 21 years. I have instructed at the California Community Colleges, at the California State University system, at the Basic Law Enforcement Course and in regional advanced officer training under the auspices of the California Commission on Peace Officer Standards and Training (P.O.S.T.).

I have also provided legal update instruction on *Miranda* issues in advanced officer training through the Santa Rosa Regional Criminal Justice Training Center for law enforcement agencies in Marin, Sonoma, Mendocino, Lake, Humboldt and Solano Counties.

In addition, for 10 years I have instructed a "Legal Aspects of Interrogation Law" block in the P.O.S.T. certified "Interview and Interrogation Techniques" course through the Behavior Analysis Training Institute (BATI) based in Santa Rosa. This course is taught throughout California.

4. Throughout my career as an educator, I have taught interrogation law and techniques to over ten (10) thousand peace officers from the State of California and adjoining states. Approximately 20 officers from the Santa Monica Police Department have attended by training at the BATI "Interview and Interrogation Techniques" course.

5. Prior to entering full-time teaching in 1981, I spent 14 years in law enforcement as a patrol officer, detective and command officer of a detective bureau for the City of Novato in Marin County, California.

6. I am a member of the California Association of Administration of Justice Educators

(CAAJE) and the California Association of Police Training Officers (CAPTO).

7. I have received a nationwide award for "Excellence in Teaching" through the National Institute for Staff Organization and Development at the University of Texas, Austin.

8. I have authored a textbook on California Criminal Evidence which is currently used by 15 colleges in California.

9. I have reviewed the complaint filed by plaintiffs Bey and McNally, the complete interrogation transcript and the District Court's rulings on the defendants' Motions to Dismiss. My teachings vary from the District Court's interpretation of the relevant case law as it relates to civil liability.

10. Historically, instruction on the legal aspects of *Miranda v. Arizona*, 384 U.S. 436 (1966) has been simple. *Miranda* is a court created case law remedy affecting the admissibility of statements gained from a suspect who is subjected to custodial interrogation by the police. If officers comply with *Miranda* prerequisites, any resulting statements are admissible to prove guilt in a criminal case. If peace officers do not comply with *Miranda's* "prophylactic rule", and the court subsequently admits the statement into evidence, a Fifth Amendment violation occurs. In other

words, there is nothing unconstitutional about an officer's failure to comply with the *Miranda* rule (*Michigan v. Tucker*, 417 U.S. 433, 443-444 (1974)); *Moran v. Burbine*, 475 U.S. 412, 424-425 (1986); *Davis v. U.S.*, 129 L.Ed. 362, 370 (1994). The constitutional violation occurs only when the court allows a statement obtained in violation of the *Miranda* rule to be used at trial as evidence of guilt. (*See, Miranda v. Arizona, supra; Illinois v. Perkins*, 494 U.S. 407 (1990). Simply put, I have taught that *Miranda* is not a Constitutional right that applies during police investigation *(Oregon v. Elstad*, 470 U.S. 298, 304 (1985), but rather a trial right to be asserted in court (*Withrow v. Williams*, 123 L.Ed.2d 407, 419 (1993).

Miranda rights can be distinguished from Fourth Amendment protection against unreasonable searches and seizures and from the Sixth Amendment right to counsel (*Michigan v. Jackson*, 475 U.S. 625, 629 (1986); *Moran v. Burbine, supra,* 429-430), both of which are directly guaranteed by the Constitution.

11. My classes include training on questioning outside *Miranda*. My training is consistent with the instructional outline certified through P.O.S.T. and with recommendations made through the California Peace Officer's Legal Source book published through the Office of the Attorney General. (The P.O.S.T. instructional outline is attached as Exhibit " ".)

12. On the subject of questioning outside *Miranda*, I teach as follows:

A. Questioning outside *Miranda* is a discretionary act based upon department and/or the district attorney's office policy. I do not teach officers to automatically question outside *Miranda* nor do I actively encourage or discourage officers from doing so. I educate officers on the law and on the advantages and disadvantages of questioning outside *Miranda*. I always advise officers to refer to their police department and/or the district attorney's office policy for guidance on whether to question outside *Miranda*.

If the police department and/or district attorney policy permits questioning outside *Miranda*, then officers should have the discretion to do so. This is especially true since there is no clear appellate case that holds that questioning outside *Miranda* in a voluntary manner subjects an officer to civil liability in a civil rights action.

B. There are good law enforcement and public policy considerations for questioning outside *Miranda* other than for obtaining impeachment statements. I train officers that statements obtained by police from criminal suspects after the suspect has invoked his or her *Miranda* rights will be inadmissible in the prosecution's case in chief. But, there is a clear body of case law which permits such statements

for impeachment purposes. *(See, Harris v. New York*, 401 U.S. 222, 224 (1971) *Oregon v. Haas*, 420 U.S. 714, 723 (1975); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990); *People v. May*, 44 Cal.3d 309 (1988). These cases recognize that there is substantial public and legal interest in deterring a suspect from committing perjury on the witness stand and to expose such inconsistencies to the trier of fact.

The issue of an intentional or deliberate *Miranda* violation for impeachment statement purposes is currently under review by the California Supreme court (*People v. Peevy*). California appellate courts have split on this issue (*People v. Baker, 220 Cal.App.3d 574, 576-579 (1990);* contra *People v. Bey,* 21 Cal.App.4th 1623, 1628 (1993) and *In re Gilbert E.*, 32 Cal.App.4th 1598, 1601 (1995). The court in *Bey* and *Gilbert E.* ruled the manner in which the officers gained the outside *Miranda* statements involved involuntariness.

From a police "investigative need" standpoint and in order to promote substantial public policy interests, there are numerous reasons police officers might ignore a *Miranda* assertion and question outside *Miranda*. These include:

a.) Locating tangible or physical evidence related to the crime. Derivative evidence seized as

a result of an uncoerced admission or confession obtained outside of *Miranda* is not fruit of the poisonous tree (*Michigan v. Tucker, supra*, 445-450; *Oregon v. Elstad, supra*, 304-308; *People v. Whitfield*, 46 Cal.App.4th 947 (1996), and thus is legally admissible in court. Learning the location of yet to be recovered tangible or physical evidence is not a Constitutional violation.

b.) Locating a crime scene. It is important to locate and secure the crime scene to protect any evidence from contamination or destruction. Such evidence could be exculpatory as well as inculpatory in nature. Also, witnesses who may be able to offer relevant evidence may be located during a neighborhood check around the crime scene. There is no Constitutional violation involved in learning from a suspect the whereabouts of a crime scene.

c.) Identifying another co-principal in the crime. There is a substantial public interest in apprehending or prosecuting other principals involved in a crime. Early discovery of criminal suspects also conserves investigation time and public cost. There is no Constitutional violation involved in learning from a suspect the identity of other persons involved in the crime.

d.) Identifying other victims or witnesses in a crime. There is a substantial interest in aiding a victim or victims to a crime. Especially in

the area of violent crimes, victims may be in need of psychological counseling and are eligible for compensation from the State Victim's Crime Fund. There is no Constitutional violation involved in learning from a suspect who may be a victim or witness to a crime. Such evidence could be exculpatory as well as inculpatory in nature.

e.) Locating stolen property to return to a victim. Often times, a crime victim's property loss is not covered by insurance and the victim's socioeconomic condition does not permit a repurchase of property taken by the thief. There is a substantial public interest in assisting crime victims by returning recovered fruits of the crime.

f.) Learning more about criminal practices and methods of operation. Criminals can be "good teachers" in helping officers and investigators improve their investigative techniques. Criminals are on the "pulse beat" of the illegal subculture in a community and what police learn about criminal practices may in fact deter future crime or accelerate a future investigation.

g.) Providing the Community with "Peace of Mind." -- "Do we have the right guy?" Serial offenders and violent offenders create a state of fear in our communities. In addition, substantial resources are expended investigating these type of crimes. Questioning a serial rape suspect or

violent offender outside *Miranda* may link him or her to specific crimes which allows the police to inform victims that a suspect has been apprehended and mitigate further investigative costs. There is a substantial public interest in putting the community at ease when a dangerous suspect has been apprehended.

C. Questioning outside *Miranda* must be done in a voluntary manner. I train officers that if a suspect voluntarily agrees to talk to a police officer outside *Miranda*, there is no constitutional violation and no civil liability. (*Thornton v. Buchmann*, 392 F.2d 870 (1968); *Duncan v.* Nelson, 466 F.2d 939 (1972); *Turner v. Lynch*, 534 F.Supp. 686 (1982); *Warren v. City of Lincoln, Nebraska*, 864 F.2d 1436 (1989); *Haupt v. Dillard*, 794 F.Supp. 1480 (1992); *Brock v. Logan County Sheriff*, 3 F.3d 1215 (1993); *Giuffre v. Bissell*, 31 F.3d 1994 (1994); *Bennett v. Passic*, 545 F.2d 1260, 1263 (1976). I also train officers that they should document the totality of circumstances surrounding the outside *Miranda* interview in order to establish an atmosphere of voluntariness.

I train officers that if they obtain an outside *Miranda* statement in an involuntary manner through overt tactics such as force, threat, promise of leniency, etc., then the statement is inadmissible in a criminal case for all purposes, including for impeachment. I also instruct that an involuntary statement may also result in the

suppression of tangible or physical evidence resulting from the statement. (*People v. Vasalia*, 38 Cal.App.4th 865, (1995).

That is not to say that every involuntary statement should result in civil liability. For instance, a confession or admission obtained after telling the suspect the statement cannot be used against him or her will result in an involuntary and therefore inadmissible statement. However, this type of police conduct, without more, does not "shock the conscience" and therefore cannot result in a Fourteenth Amendment substantive due process violation. It is important to draw a distinction between police conduct that makes a statement involuntary or coerced for purposes of admissibility in a criminal case versus coercive police conduct that rises to the level of a Constitutional violation under the Fourth or Fourteenth Amendments.

In my training, I also address the 9th Circuit opinion in *Cooper v. Dupnick*, 963 F.2d 1220, 1244 (1992) and discuss the premeditated, coercive, and involuntary factual circumstances which resulted in civil liability in that case. ("What the Task Force did constitutes a 20th century inquisitorial version of the Star Chamber"; "The prisoner was held in a totalitarian nightmare where police no longer obeyed the Constitution, but instead followed their own judgment treating suspects according to their whims".)

D. An outside *Miranda* interview should be memorialized for district attorney and defense counsel review. An officer should have nothing to hide by questioning outside *Miranda* for one or more of the aforementioned investigative motives. The interview should be recorded or documented and attached as part of the investigation in the same manner as any other evidence. The interview should be forwarded to the district attorney and available for discovery by defense counsel.

13. As an expert in the field of interrogation law and techniques, it is my opinion that there are sufficient legal safeguards already in place for a *Miranda* violation. Statements are inadmissible in the prosecution's "case in chief". Involuntary statements which are factually the result of a Fourteenth Amendment due process violation such as coercion or inducement are inadmissible for all purposes (including impeachment and the derivative evidence introduction). Furthermore, conduct which shocks the conscience or violates the Fourth Amendment subjects an officer to civil liability.

14. In my opinion, the mere act of questioning outside *Miranda* in and of itself, without overt coercive circumstances, where a suspect expressly or implicitly agrees to talk to an officer who is pursuing an investigative motive, is a discretionary function. Because there is no clearly established legal precedent to the contrary,

a reasonable law enforcement officer could believe that it is permissible to question outside *Miranda* in a noncoercive manner and that the officer will not be subjected to civil liability unless his or her conduct violates the Fourth Amendment and/or the substantive due process provision of the Fourteenth Amendment.

15. To impose civil liability under section 1983 on a police officer for asking a suspect questions outside *Miranda* is contrary to law enforcement and public policy interests. Moreover, to rule that merely questioning outside *Miranda* is coercive and involuntary, without an additional factual showing of involuntariness which is equivalent to the task force's conduct in *Cooper v. Dupnick*, deters proper and effective law enforcement, runs contrary to the societal interest in assisting crime victims, and subjects the public to bear the expense of defending unnecessary lawsuits.

Under these circumstances, the interests of society should take precedence. If the suspect does not want to talk outside *Miranda,* the choice is simple - he or she can just say no!

16. I have compared McNally's and Bey's allegations with the task force's conduct in *Cooper v. Dupnick.* I have also read the McNally interrogation transcript. And, in my opinion there is absolutely no comparison between the Santa

Monica officer's conduct in McNally and that of the *Cooper* task force. To characterize the task force's conduct in *Cooper* as similar to the officers' conduct in *McNally* is to characterize a "hurricane as but a movement of air." (*Cooper* at 1237.) The Santa Monica officers' questioning of McNally was a "far cry" from the scenario described in *Cooper.* It should also be noted that Bey and McNally are convicted murderers where *Cooper* was in fact an innocent person falsely under arrest.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Signed on May 2, 1997 at Santa Rosa, California.

/s/Raymond Hill
RAYMOND HILL

APPENDIX G

[Petitioner Talbot's Declaration from Ninth Circuit Excerpt of Record at pp. 151-167]

DECLARATION OF SHANE TALBOT

I, SHANE TALBOT, declare that I have personal knowledge of the following facts and if called as a witness I could and would competently testify thereto.

1. I am a police detective employed with the City of Santa Monica Police Department (SMPD), where I have worked since 1973. I have been assigned for 18 years as a detective in the Office of Criminal Investigations. I have been a homicide detective for 12 years. I was the principal investigator assigned to the homicide of James Harold Jones, who was killed in Santa Monica, California in the early morning hours on or about February 28, 1993.

2. On March 1, 1993, police dispatch informed me that a homicide had occurred at 1959 Cloverfield Blvd., Apt. 206, Santa Monica, California. I went to that address about 11:00 a.m.

3. Upon entering the apartment I went to the bedroom, where I observed

James Jones' body lying nude in an unmade bed with numerous stab wounds to his upper right chest and shoulder area and lacerations to his face.

4. Detectives already on the scene informed me that Mr. Jones' car, a 1985 Audi Fox, was missing from its assigned parking space and had been reported to the National Crime Index Center (NCIC) with instructions that, if found, the vehicle should be stopped, all occupants detained, and the car held for latent prints.

5. Mr. Jones' apartment appeared to have been ransacked. Numerous drawers were left open; clothing was removed from bureaus and scattered on the floor, along with articles of jewelry and small change. The stereo system and VCR in the living room were disconnected and readied for carrying.

6. I observed Jones' body lying in an unmade bed in one of the two bedrooms. There was a copious quantity of blood in the bed, but only drops elsewhere in the room or apartment. I examined Jones' body more closely and observed approximately 15 serious stab wounds, four to his back, nine to his front chest and upper right shoulder, and two to the arm pit of his right arm, as

well as lacerations to his face. There was blood splattered on the headboard of the bed, which appeared to be from the victim's body. Semen was identified on the bedclothes.

7. What appeared to be Caucasian body hairs were visible on the bed sheets. The victim, who was African American, had very little body hair.

8. There was a television set and a Video Cassette Recorder in the bedroom with the victim, both in the "on" position when the body was found. An X-rated video depicting homosexual male and heterosexual pornographic activity was in the VCR.

9. Based on my experience as a detective, and the evidence at the scene, including the nude male body in the bed, the bisexual pornographic video, the Caucasian body hairs, the presence of semen, and the degree of physical violence to the corpse, I suspected that this incident may have involved homosexual activity.

10. In my experience as a detective, I have been trained and have observed that in situations involving physical intimacy, an argument or other incident may trigger a

"heat of passion" or rage, resulting in the violent event. That a crime is committed in the "heat of passion" may be a legally mitigating factor in the appropriate charge, or degree of guilt. So I would normally try to assess whether a crime occurred in the heat of passion, or was premeditated.

11. I observed a half-full Budweiser beer can in the living room, with blood on it. This indicated to me that after committing the homicide, the perpetrator stopped to have a beer.

12. I directed the Santa Monica Police Department Identification Technicians (ID techs) to collect and preserve more than 50 items of crime scene evidence for identification and analysis. The ID techs and detectives processed the scene for physical evidence, and diagramed, photographed and videotaped the apartment. They processed the area for fingerprints, and found some that later were matched to those of the suspect, James McNally. The body hairs collected from the bed where the victim lay matched the characteristics of James McNally, plaintiff herein.

13. Photographs attached as Exhibit "G" are true and correct copies of

photographs taken at the crime scene on March 1, 1993, and of James McNally on March 2, 1993. The crime report and supplemental crime reports attached as Exhibit "F" are true and correct copies of the SMPD crime reports of this homicide.

14. I was informed and believed that on March 1, 1993, Santa Monica Police Detective Nick Cicciarelli interviewed Ben Scott, Jr., and Marie Mildred Owens, who resided together in apartment 106, directly beneath the victim's unit. Detective Cicciarelli told me that Scott and Owens heard some noises in the night that sounded like sexual activity, that at or about 1:30 a.m. they heard one muffled cry, then someone showering, the sounds of drawers and closets opening and closing, and then someone exiting the apartment. They did not hear any sounds of a struggle.

15. I was informed and believed that on March 1, 1993, Santa Monica Police Detective Jim Archer interviewed Mary Avila, who resides at 1959 Cloverfield Blvd., Apt. 122. Detective Archer told me Mary Avila reported that she was close friends with the victim, and that she saw him on Friday, February 26, 1993 at approximately 6:30 p.m. in the company of several white males, one of whom had sandy brown hair.

Ms. Avila reported that on Saturday, February 27, 1993, she spoke with the victim, who told her that people with him the day before were friends from Louisiana.

16. While still at the crime scene in the afternoon of March 1, 1993, the Flagstaff, Arizona Police notified the SMPD that they had arrested James McNally, who was driving the Audi Fox owned by the victim, James Jones. The Flagstaff Police said that suspect McNally admitted to being in Jones' apartment, and wanted to talk to detectives. McNally told the Flagstaff Police where the murder weapon was located, and based on his information, we recovered a bloody kitchen knife from the roof of the carport at the victim's residence.

17. On March 2, 1993, I flew to Flagstaff, Arizona, along with Detective Sergeant Ray Cooper, to question James McNally regarding the death of James Jones and to return him to California. I read Mr. McNally his *Miranda* rights; he waived them, and agreed to speak with us. He said he had met Mr. Jones at a bar and gone home with him. He said that Jones came out of the bathroom naked, holding a knife and demanding sex. He said they struggled, he got hold of the knife and he killed Mr. Jones in self defense. My assessment was that

Mr. McNally was not being truthful with us, because his story did not fit with the physical evidence at the crime scene.

18. With the arrest of McNally I suspected we were dealing with a homosexual incident because of the dead male body, the X-rated bisexual video, the presence of semen, the presence of body hairs in the bed that did not match those of the victim, and the degree of violence or overkill in the homicide, indicating passion or rage.

19. I also knew that I was dealing with a robbery or a burglary, because the apartment was ransacked, the living room stereo and VCR were disconnected, and some of the victim's property, including his automobile and other items, was missing. If McNally formed the intent to steal from the victim before the homicide, the crime would be a special circumstances case, and he could be sentenced to life in prison without possibility of parole. If McNally formed the intent to steal after the homicide, the crime could be a lesser offense, possibly second degree murder or manslaughter.

20. Based on my experience and training in crime scene investigation, the

evidence collected, and the neighbors' statements, my opinion was that the circumstances of Jones' death were not consistent with self-defense. First, I concluded, based on the position of the body and the pattern and distribution of blood in the bed and throughout the apartment, that the victim had been surprised. Second, the victim was a very large male, as is Mr. McNally. The scenario that McNally described to us involved a struggle. The downstairs neighbors, present in the room directly below, in the dead of night, did not hear a struggle. They did hear sexual activity prior to a muffled cry. Third, McNally sustained only a relatively small injury to one hand. If Jones started out with the knife, intending to do McNally harm, it is probable that McNally would have been more seriously injured. All of this evidence points to a victim who was surprised, and a killing that was not self-defense. The story of self-defense that Mr. McNally described was not consistent with the physical evidence.

21. I have been a police officer for 23 years, and a detective for 18 years. Since becoming a detective I have regularly attended numerous advanced professional educational training schools, seminars and courses on homicide investigation and

interrogation techniques. I have attended a multi day course on California Homicide Investigation nearly every year since 1986, as well as many other specialized courses. The curriculums have covered a variety of topics, including interrogation techniques and the laws regarding *Miranda* rights and constitutionally permissible interrogation. In addition, I regularly talk to other homicide detectives, and to District Attorneys and various judges regarding permissible interrogation of criminal suspects. All of these sources regularly give me feedback about what interrogation techniques will elicit an admissible statement, and what techniques might cause the court to exclude a statement for any purpose.

22. My role as a police detective is to solve crimes. This includes collecting evidence in order to identify what crime, if any, has been committed, and to identify the perpetrator(s). My questions are designed to elicit information to confirm that the person I am questioning is, indeed, involved in the crime. To identify what crime has been committed, I must understand what happened at the crime scene. In a homicide, the state of mind and intent of the perpetrator affect the degree of the crime. My questions are designed to

elicit facts that will establish whether a homicide is first degree murder, second degree murder or manslaughter, and whether a first degree murder is a special circumstance case. The prosecutor then uses this evidence to decide how to charge the crime, and to develop and try the case.

23. My questions are also designed to elicit information about whether there is a weapon or other material that could pose a danger to the public or the police, whether there are accomplices or witnesses to the crime, and if so, their whereabouts, and about the location of other victims or missing property. I also may inquire into whether the perpetrator of one crime might be responsible for other unsolved crimes, or whether he or she is a serial perpetrator of a crime such as rape or burglary.

24. My questions are designed to test whether the version of events recounted by the crime victim and witnesses is accurate and is verified by the suspect. Often, the suspect may be the only other person with first hand knowledge to confirm the version of events recounted by the victim. If there is no victim who can speak, my questions are designed to reconcile the evidence of the crime scene.

25. I always Mirandize every custodial suspect before I interview him or her. Rarely will a custodial suspect invoke his or her *Miranda* rights and refuse to speak to me. It is my experience that most people want to tell their story, and want to talk to me.

26. During the course of my detective career I have interrogated approximately 50 murder suspects, in 40 different crimes. Of those, I have questioned the suspect outside of *Miranda* in only three or four instances. I have questioned outside of *Miranda* only rarely in my career, in less than 5% (five percent) of the total interrogations.

27. I have never had an out of *Miranda* confession that I took used for impeachment. Either the out of *Miranda* statement was exculpatory, and useful to the defense, the defendant did not testify. Mr. McNally's trial was the first and only case in which an out of *Miranda* confession that I took was excluded by the court for all purposes.

28. When I am investigating a homicide and I question outside of *Miranda* my intent is to find out what happened, regardless of whether the information is

admissible to prove guilt at trial. I am looking for information that is consistent with the physical evidence at the scene. I am also looking for exculpatory information that may reveal that I have the wrong suspect, or that the crime is chargeable as second degree murder or manslaughter, rather than first degree or special circumstances. I also may be trying to uncover accomplices and witnesses to the crime. I may be looking for a body, for weapons, or for missing property.

29. It is my understanding that I would not be civilly liable for questioning a suspect outside of *Miranda* so long as my questioning is not physically or psychologically abusive, and does not shock the conscience. I have been trained that *Miranda v. Arizona* and cases that follow set out rules of evidence, that apply to testimonial statements taken from suspects in custody. I know from my training and experience that evidentiary statements taken outside of *Miranda* may be excluded from the case in chief at trial. I have learned that physical evidence that I find, or leads to witnesses or accomplices that I develop based on benign questioning outside of *Miranda* may be used at trial.

30. At the time of an interrogation, I do not know whether a suspect will be charged with a crime. My job is to get the suspect's truthful statement, if he or she will talk to me, and to collect evidence that is used to solve and prove the crime. Although I work closely with prosecutors, my role is separate and distinct from theirs. The prosecution will decide whether ro charge a suspect, and with what crime, based on information that I uncover and other information from any available source.

31. I do not have the power or duty to determine which, if any statements are admissible in a court of law. That is up to the trial judge.

32. About two thirds of the way through the interrogation Mr. McNally asked to speak to a "California" attorney. We were, at that time, in Arizona. McNally could not speak to a California attorney until we returned to California, later that day after his extradition hearing.

33. When I questioned Mr. McNally in Flagstaff, Arizona, I was mindful that at least one witness, Mary Avila, had seen the victim, Mr. Jones, in the company of one or more Caucasian males, at least one of whom had sandy brown hair, several days

before the crime. Mr. McNally has sandy brown hair. Mr. McNally told me that he had taken the bus to California from Arizona, had met up with two other men and gone to Venice Beach. I wanted to determine if Mr. McNally and the acquaintances he described were the same people seen by Mary Avila with the victim, Mr. Jones, several days earlier. If so, these individuals might have been accomplices to the crime, or witnesses to the crime. If I could identify these individuals by questioning Mr. McNally outside of *Miranda*, my understanding is that evidence developed from this questioning would have been admissible at trial.

34. We interrogated McNally in Flagstaff, Arizona starting at noon, in the Coconino County Jail. The interrogation took place in a large day room, approximately 20 feet by 30 feet, with a long table in the center. Mr. McNally, Sergeant Cooper and I were the only people present. McNally did not eat or drink during the interrogation, nor did he request any food or drink. The temperature in the room was comfortable. The room was well lit. There were no exterior windows. Two doors had wire safety windows that overlooked a corridor. I do not recall McNally being handcuffed or restrained in any way. I did

not yell or scream at him at any time. I did not hit him, rough him up or otherwise physically intimidate or threaten him. Neither did Sergeant Cooper. The entire conversation was conducted in a businesslike volume and tone. Both Sergeant Cooper and I were dressed in business suits. McNally didn't cry or otherwise break down emotionally.

35. The entire interrogation lasted less than one hour and fifteen minutes. My recollection is that the interrogation continued for approximately 10 - 15 minutes after the tape stopped recording. I was unfamiliar with the tape recorder, and did not discover until later that minutes were missing from the end of the tape.

36. During the unrecorded portion of the interview I questioned McNally for the purposes of identifying witnesses or accomplices to the crime. I questioned him about his acquaintances with whom he spent the day prior to meeting Jones, and tried to ascertain if he was the same person seen with the victim by Mary Avila on Friday, February 26, 1993. I also questioned McNally in an attempt to recover the property stolen from the victim's house.

37. I questioned Mr. McNally out of *Miranda* in order to reconcile the evidence that this was a homosexually related "crime of passion" or rage, with the evidence of robbery or burglary. In my experience the District Attorney assigned to a case always asks me what I think happened and how the crime should be charged. I was trying to ascertain whether this was a special circumstances case, or some lesser crime. I was not questioning Mr. McNally outside of *Miranda* for the sole or primary purpose of developing impeachment evidence against him.

38. At the time that I questioned McNally outside of *Miranda* I did not believe that I was violating any of his constitutional rights.

39. About two thirds through the interrogation McNally asked to speak with a California attorney. We were not in California at that time. I told him that from that point on nothing he said could be used against him. We continued to speak for several pages of transcript. On page 57 of the transcript I said

". . .The only thing is, everything that falls after this - we'll go in one direction based on the physical evidence and the

statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna' push it."

McNally said, "Right." and then I said,

"Okay, and fuck your attorney. It's just - I don't care about him anymore."

This interchange referred to the evidence to be presented to the District Attorney supporting the correct charge for the crime. Whether, based on the property thefts, I believed McNally intended to steal form Jones, and killed him to facilitate the theft - a special circumstances case. Or, whether, based on the evidence of rage or passion, McNally should be charged with a lesser degree of murder. I was communicating to Mr. McNally that the only statement I would find persuasive is one that is consistent with the physical evidence, regardless of the advice of an attorney. Conferring with an attorney, and the passage of time would not change the truth about what happened in this case. In fact, the more time that passed the less accurate McNally's recall would be. And if there were other suspects or accomplices, the passage of time would make them more difficult to apprehend. This is especially true since Mr. McNally's

acquaintances were, by his account, transients.

40. This interchange was also intended to communicate to McNally that the evidence collected so far, including his incredible story of self-defense, was consistent with a special circumstances charge; therefore, unless he could provide a credible statement, consistent with the physical evidence, of some lesser intent, he was facing a special circumstances charge of life without possibility of parole.

41. Mr. McNally used the word "fuck" or one of its variations numerous times throughout the interrogation. He used this word both before and after my usage. I did not think he was offended by the word, or that he took its casual usage as anything more than common street vernacular.

42. Even after Mr. McNally's invocation, he said several times that he wanted to talk, and wanted to tell us what happened.

43. McNally then gave us a statement outside of *Miranda*. He said he met the victim outside of the Oarhouse, a local bar. Jones asked him if he wanted to

have some beers, and he went home with Jones. They watched a pornographic video. Jones offered him $50 in exchange for sex, and said he could spend the night. He agreed to have oral sex with the victim, and they did. They were in Jones' bed together and nude. McNally then tried to go to sleep. Jones touched him in an attempt to have anal sex. McNally didn't like it. He went to the kitchen, ostensibly to get a beer, and also found a kitchen knife. He returned to the bedroom, concealing the knife, and put it on the floor near the bed. He got back into bed. He told Jones he wanted to go to sleep. His back was to Jones. When Jones again touched him in an attempt to have sexual contact McNally used the knife to stab him. He then rifled through the apartment looking for the $50 he had been promised, and fled, taking some compact discs, a video camera, and the victim's automobile.

44. The out of *Miranda* statement that McNally made was consistent with the crime scene evidence. And, it resulted in my telling the District Attorney that I did not believe McNally formed the intent to steal before killing Mr. Jones. McNally's statement before invocation was not consistent with the crime scene evidence.

45. Mr. McNally remained in my presence and my company for several hours after the interrogation, including the plane ride back to California. We conversed during that time. Much of the conversation was initiated by McNally himself. Most of the time, we talked about sports or other casual conversation.

46. Mr. McNally telephoned me in 1994 to discuss the pre-trial probation officer's report, dated May 19, 1993. A true and correct copy of this report is atached as Exhibit "I". A true and correct copy of the transcript of this telephone conversation is attached as Exhibit "K". McNally took issue with the probation report's statement, taken from police crime report, that he "made love" to the victim, because he claimed it was inaccurate. Notably, McNally did not express concern about the accuracy of the pre-trial report's statement that the death of Jones was cruel, callous, and intentional. During that telephone conversation McNally told me that I had been "real honest" and "above the board" with him, and that his only problem with the report was the statement that he made love to the victim.

47. Mr. McNally was tried for murder and robbery in December of 1994. He moved to have his confession of murder

excluded for all purposes. I attended the hearing on the motion. The court granted the motion and excluded the confession for all purposes. So, the case was tried on McNally's first version of the facts -- the self defense version -- and the jury convicted McNally of manslaughter.

48. I have reviewed the Declarations of Rutledge, Tyler, Hill and Carey attached hereto. The courses I attended on interrogation techniques and the laws regarding Miranda rights and constitutionally permissible interrogation were consistent with the teachings expressed in those declarations.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed at Santa Monica, California, on May 5, 1997.

/s/Shane Talbot
DETECTIVE SHANE TALBOT

No. 99-1594 (2)

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

JAMES T. BUTTS, RAY COOPER, SHANE TALBOT, RAYMOND BENNETT, AND MICHAEL CROSBY

Petitioners,

v.

JAMES McNALLY AND JAMES JOHNSON BEY

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations is a non-profit organization, representing state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that serves to advance the interests of law enforcement officers through advocacy, education and legislation. NAPO represents 4,000 organizations, with more than 220,000 sworn law enforcement officers and 11,000 retired officers. Within the Ninth Circuit, NAPO represents through its members tens of thousands of officers in Alaska, Arizona, California, Montana, Nevada, Oregon, and Washington, including the five Petitioners.

Therefore, the associations and officers represented by NAPO and its 501(c) affiliate, the National Law Enforcement Officers' Rights Center, have a direct and immediate interest in the resolution of any issue which simultaneously affects both the ability of law enforcement officers to investigate crimes, and their potential civil liability for doing so in particular ways. This case presents such an issue.*

SUMMARY OF ARGUMENT

Confusing *admissibility* with *permissibility*, the Ninth

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*No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. The Respondents and the Petitioners have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

Circuit Court of Appeals has wrongly held, in conflict with every other federal Circuit which has addressed the issue, that because interrogation techniques used by officers rendered criminal defendants' statements inadmissible in their trials, the officers *ipso facto* violated the Fifth Amendment *trial* privilege *during interrogation,* making them subject to civil liability under 42 U.S.C. §1983. *California Attorneys for Criminal Justice v. Butts,* 195 F.3d 1039 (9th Cir. 1999).

This holding (1) mistakes the evidentiary prophylaxis of *Miranda v. Arizona,* 386 U.S. 484 (1966) for the Fifth Amendment's privilege against compulsory self-incrimination, (2) wrongly imports principles of Fourteenth Amendment due process into Fifth Amendment analysis, and (3) leaves officers throughout the Ninth Circuit exposed to unwarranted liability for interrogation practices that do not violate this Court's interpretations of constitutional standards.

ARGUMENT

Can a killer get away with murder by committing perjury during trial while the judge and the prosecutor are forced to sit silently by, and then sue the police officers for having questioned him in such a way as to have deprived the prosecutor of the use of his confession to prove the murder or to impeach the perjury? Astonishingly, the Ninth Circuit's

opinion in this case answered that question in the affirmative.

Respondent James McNally told police that he lay in wait with a kitchen knife at the ready and then stabbed his victim to death. Under California law, this is a capital murder. Calif. Pen. C. §190.2(a)(15). But McNally's statement was made in response to police questioning after a *Miranda* invocation, and so it was inadmissible at trial to prove guilt.

Further, because the officers had made representations that the statement could not be used in court and had denigrated the role of counsel, the statement was ruled inadmissible even for impeachment, under the Fourteenth Amendment's due process clause "voluntariness" cases.

Under the cover of judicially-created exclusionary rules, McNally testified under oath at his jury trial to a substantially different account of the killing. As a result, he was convicted only of the lesser charge of manslaughter. He has now sued the police officers under 42 U.S.C. §1983 for a violation of his Fifth Amendment privilege against being compelled to be a witness against himself—even though his statements were *never* introduced at his trial, and even though the officers' missteps caused him *no* damages, but in fact inured to his benefit by allowing him to escape a murder conviction and penalty via the expedient of incontestable perjury.

In the other case, Respondent James Bey was convicted of murder, the state appellate court finding harmless error in the impeachment use of his post-invocation statement, which was ruled involuntary because of similar police assurances it would not be used in court. *People v. Bey,* 21 Cal.App.4th 1623 (1993). Bey also sued the police under §1983 for a claimed Fifth Amendment violation.

In the combined cases, the Ninth Circuit affirmed a denial of qualified immunity for the petitioning officers, notwithstanding that clearly established law recognized that decisions of this Court have given officers an incentive to continue questioning after a *Miranda* invocation. *Oregon v. Hass,* 420 U.S. 714, 723 (1975).

I. The Ninth Circuit's decision that police officers may be liable under §1983 for questioning a suspect who has invoked *Miranda*'s protection is irreconcilable with the consistent line of cases from this Court clarifying that *Miranda* is a court-created, non-constitutional, evidentiary prophylaxis designed to prevent Fifth Amendment violations at trial, and that the privilege protected by *Miranda* is not violated by questioning or even by compulsion, but by erroneous admission of compelled testimonial self-incrimination.

In conflict with every Circuit to have considered the question (*see* Pet. Br. at 23), the Ninth Circuit has twice ruled (in *Cooper v. Dupnik,* 963 F.2d 1220 (9th Cir. 1992), and in this

case—*Cooper's* spawn), that police questioning not comporting with *Miranda*'s courtroom admissibility requirements constitutes an accomplished violation of the Fifth Amendment in the police station that is actionable under §1983. In both cases, the Ninth Circuit has failed to observe the critical distinction between police procedures that merely render resulting evidence constitutionally inadmissible in a criminal trial, and those procedures that work a constitutional violation at the moment police employ them, without regard to whether evidence is obtained or admitted at trial.

Both in *Cooper* and in the present case, the Ninth Circuit's analysis mistakenly assumed that police conduct that rendered evidence inadmissible at trial was *itself* constitutionally impermissible. Comparison of the categories of exclusionary rules and their objectives shows this assumption to be unsound. That an officer's noncompliance with *Miranda*'s prophylactic procedures may render a statement inadmissible in the prosecution case in chief does *not* mean that the officer has violated the Fifth Amendment, so as to be liable in civil damages. Indeed, the defendant who benefits by application of this exclusionary rule has not been "damaged" at all—only the police, the prosecution and society are left in a worse condition when highly probative evidence of a

defendant's guilt may not be disclosed to the jury.

A number of judicial exclusionary rules have been erected to prevent the introduction of evidence where a core constitutional right would be violated or impermissibly burdened *if the evidence were used for an improper purpose at trial.* For example, a defendant's Sixth Amendment trial right of confrontation would be violated by the introduction in a joint trial of a non-testifying codefendant's confession implicating both. *Bruton v. United States,* 391 U.S. 123 (1968). But that situation does not mean that the interrogating officer has violated the Sixth Amendment by asking the questions that produced the inadmissible statement.

Similarly, introduction at trial of a suggestive pretrial identification might violate procedural due process. *Stovall v. Denno,* 388 U.S. 293 (1967). But the officer who conducted the identification procedure did not violate the U.S. Constitution merely by doing so in such a manner as to render the identification inadmissible. Civil liability under §1983 could not be predicated on *inadmissibility* under *Bruton* or *Stovall. E.g., Hutsell v. Sayre,* 5 F.3d 996, 1005 (6th Cir. 1993) (no police liability for conducting an inadmissible identification procedure).

By contrast, other exclusionary rules function not to

prevent violations at trial, but *to deter official misconduct* that works an accomplished constitutional violation when committed. For example, no evidentiary interest protected by the U.S. Constitution is abridged by the introduction of evidence seized in violation of the Fourth Amendment. But this Court has ruled that evidentiary exclusion of the fruits of such violations is necessary to deter repetition of the constitutional error *already committed* by the police. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Likewise, where substantive due process has been breached by egregious official behavior that "shocks the conscience," resulting evidence is excluded in order to deter disrespect for the standards of decency embodied in the concept of due process. *Rochin v. California,* 342 U.S. 165 (1952). In such cases, potential §1983 liability *does* arise, because exclusion of evidence is contingent upon an accomplished police violation of constitutional rights.

Into which category does the *Miranda* exclusionary rule fit? Is it, like *Mapp* and *Rochin,* intended to deter future violations of the Constitution of a kind *already committed* by police conduct? Or is it, like *Bruton* and *Stovall,* intended to *prevent* a violation *at trial*? Is Miranda's objective to *mold police conduct*, or to *prevent the admission of evidence* that might violate the Fifth Amendment trial privilege against

compelled self-incrimination? In other words, is *Miranda remedial,* or is it *prophylactic?*

This Court has answered these questions repeatedly, clearly and consistently, as follows: "The constitutional issue we decide...is the *admissibility* of statements obtained from a defendant questioned while in custody." *Miranda v. Arizona, supra,* 384 U.S. at 445 (emphasis added). The "narrow issue" decided by *Miranda* was "admissibility of statements." *Beckwith v. United States,* 425 U.S. 341, 345 (1976). "[*Miranda*'s] objective is not to mold police conduct for its own sake." *Moran v. Burbine,* 475 U.S. 412, 425 (1986). Interrogation without *Miranda* compliance does not abridge the Fifth Amendment privilege, but simply "depart[s] from the prophylactic standards" of that decision. *Michigan v. Tucker,* 417 U.S. 433, 446 (1974). "The Court made it clear that the basis for decision was the need to protect the fairness of the trial itself...." *Schneckloth v. Bustamonte,* 412 U.S. 218, 240 (1973). "*Miranda* safeguards 'a fundamental trial right'." *Withrow v. Williams,* 507 U.S. 680, 692 (1993).

Since "*Miranda*'s preventive medicine" is available to a person "who has suffered no identifiable constitutional harm," *Oregon v. Elstad,* 470 U.S. 298, 307 (1985), it is evident that the *Miranda* exclusionary rule is designed to prevent Fifth

Amendment violations *at trial,* rather than to remedy constitutional violations already committed by police. In reversing the Ninth Circuit in an earlier case, this Court made the distinction plain: The privilege against self-incrimination "is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials may ultimately impair that right, *a constitutional violation occurs only at trial.*" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added).

In *United States v. Balsys,* 524 U.S. 666 (1998), the Court rejected the notion that the Fifth Amendment provides a "protection of personal inviolability" prohibiting involuntary interrogation, without regard to whether testimonial responses could or would be used in a criminal prosecution. This ruling in *Balsys* is consistent with the Court's teachings that the Fifth Amendment is not violated by the *compulsion* of statements, but by the *use* of compelled statements in a criminal prosecution. *Lefkowitz v. Turley,* 414 U.S. 70, 78, 84 (1973); *Kastigar v. United States,* 406 U.S. 441, 453 (1972); *Garner v. Broderick,* 392 U.S. 273, 276 (1968).

Balsys is also consistent with the quoted passage from *Verdugo-Urquidez, supra,* that a violation of the Fifth Amendment can only occur *at trial,* when a compelled

statement is wrongfully introduced. Although *Miranda* holds that a person undergoing custodial interrogation may claim the protection of the Fifth Amendment in refusing to talk to police—and once that right is invoked, subsequent statements will be inadmissible at trial to prove guilt—nothing in *Miranda* or any of this Court's other decisions applying the Fifth Amendment privilege against compelled self-incrimination suggests that continued *questioning* violates the Fifth Amendment. This must be, since the *Miranda* procedures "were not themselves rights protected by the Constitution." *Michigan v. Tucker, supra,* 417 U.S. at 444.

II. The Ninth Circuit's reliance on inadmissibility of Respondents' statements under *procedural* due process is misplaced, because Petitioners' conduct was not "shocking to the conscience," in violation of *substantive* due process, and also because inadmissibility under the Fourteenth Amendment due process standards is irrelevant to Respondents' asserted Fifth Amendment cause of action.

Compounding its error in looking to *Miranda* evidentiary decisions to assess police liability for constitutional violations, the Ninth Circuit also relied upon evidentiary principles from due process clause cases to bolster its opinion that officers could be civilly liable when their interrogation renders statements inadmissible. This is the same analytical mistake, applied to a different body of decisional law.

Miranda's concern was protection of the Fifth Amendment trial privilege against introduction of presumptively-compelled statements resulting from the inherently compelling atmosphere of custodial interrogation. *Miranda* is not a substitute for the due process voluntariness inquiry that focuses on the presence or absence of actual police coercion by such tactics as force, threats or overbearing promises of leniency. *Miller v. Fenton*, 474 U.S. 104, 110 (1985); *Oregon v. Elstad, supra,* 470 U.S. at 307-08. Even though a statement obtained by police-initiated questioning after a *Miranda* invocation is admissible for impeachment, *Oregon v. Hass, supra,* 420 U.S. at 723, an involuntary statement obtained by actual police coercion is not. *Mincey v. Arizona,* 437 U.S. 385, 398 (1978). These were the principles applied by the California courts in Respondents' criminal trials and appeals.

But as discussed above, admissibility determinations are not necessarily conclusive of whether constitutional rights were violated by particular police conduct. In the Fourteenth Amendment inquiry in state cases, as in the Fifth Amendment due process inquiry in federal cases, it is important to distinguish between *substantive* and *procedural* due process. *Daniels v. Williams,* 474 U.S. 327, 337-38 (1986) (Stevens, J.,

concurring).

Substantive due process protects against arbitrary government actions. A violation of substantive due process "is complete when the wrongful action is taken." *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). Police interrogation violates substantive due process when techniques are employed that "shock the conscience." *Cf., County of Sacramento v. Lewis,* 523 U.S. 833 (1998). If, for example, police used force or other egregious measures to coerce a statement, their constitutional violation would be complete and actionable, and any resulting statement would be inadmissible at the declarant's criminal trial, for any purpose. *E.g., Beecher v. Alabama,* 389 U.S. 35, 38 (1967) (suspect ordered at gunpoint to confess or be killed, while officer fired rifle next to suspect's ear).

Procedural due process seeks to guarantee fairness of the methods used by the state to deprive a person of life, liberty or property. Even though police interrogation might not be so offensive as to shock the conscience, it might still be sufficiently coercive (mild threats and promises of leniency, for example) as to render a statement involuntary, and so inadmissible at trial under procedural due process. *Arizona v. Fulminante,* 499 U.S. 279, 287 (1991) (credible threat by police agent made confession involuntary).

Police assurances to a suspect under interrogation that his statements will not be used against him in court may arguably be sufficiently coercive as to make a statement inadmissibly involuntary. The fundamental fairness implicit in procedural due process might preclude evidentiary *use* of statements induced by such promises. *Cf., Doyle v. Ohio,* 426 U.S. 610, 618-19 (1976) (due process is violated if silence induced by *Miranda* assurances is used at trial for impeachment). But such assurances are not shocking to the conscience and do not violate the U.S. Constitution.

Therefore, even in a §1983 liability analysis for a *Fourteenth* Amendment violation, it would be error to base potential liability on the fact that police used inducements that made statements inadmissible under *procedural* due process, where the inducements were not so extreme as to shock the conscience and hence violate *substantive* due process.

The Ninth Circuit's opinion, however, commits error upon error, first relying upon the *inadmissibility* of respondents' statements under procedural due process (which does not imply a police violation of the Constitution), and then importing this *Fourteenth* Amendment admissibility law into the analysis of whether police questioning violated the *Fifth* Amendment rights of respondents. The result is an invalid conclusion.

Police practices that cause inadmissibility under the Fourteenth Amendment (without themselves violating that Amendment when employed), combined with police practices that cause inadmissibility under the Fifth Amendment (without themselves violating that Amendment when employed), cannot be added together to create an accomplished violation of the Fifth Amendment. The Ninth Circuit's decision is both logically and legally unsupportable. And it is precarious.

III. If allowed to stand, the Ninth Circuit's decision will have a serious impact on law enforcement, as officers become apprehensive about questioning criminal suspects.

It is not difficult to imagine the chilling effect this decision will have on law enforcement officers throughout the states comprising the Ninth Circuit's geographical jurisdiction. Officers now recognize that their investigative efforts later found by courts to have resulted in inadmissible evidence—whether under *Miranda* or procedural due process—can furnish the basis of civil liability, even though the actions themselves violated no provision of the Constitution. Therefore, officers will be understandably reluctant to risk their personal assets by engaging in interrogation at all.

Police will not always be able to predict, for example, whether their words or conduct will be considered a threat or promise that causes a statement to be involuntary. And the

many confusing and misunderstood *Miranda* concepts (custody, interrogation, warning, waiver, invocation, reinitiation, and safety exception) remain so unpredictable in many situations that, "In many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained." *Oregon v. Elstad, supra,* 470 U.S. at 316.

Where interrogation of a suspected murderer or other offender is subject to such interpretive uncertainty, the added risk of §1983 liability can have only one effect on the police officer, and that is "to make him less willing to do his duty." *United States v. Leon,* 468 U.S. 897, 920 (1984) (citation omitted). The costs to public safety of investigative reticence will be paid not merely by the loss of evidence and harm to criminal justice, but by the loss of innocent life. *Cf., People v. Krom*, 461 N.E.2d 276, 278-79 (N.Y. 1984) (when a kidnaping suspect asked for counsel, officers stopped all questioning; meanwhile, his victim suffocated in a coffin-like box).

CONCLUSION

It seems doubtful that when the §1983 remedy was provided by the Ku Klux Act of 1871, the Congress could ever have foreseen that a United States Court of Appeals would someday extend availability of this remedy to convicted killers,

whose criminal prosecutions had been deprived of the most probative and damaging evidence of their guilt, all because police continued to seek the truth from them while acknowledging that their assertion of rights would make their statements inadmissible against them.

This decision of the Ninth Circuit is simply wrong. It conflicts with principles enunciated by this Court, as well as the rulings of four other Circuits. Its potential consequences for law enforcement and public safety are unacceptable and unwarranted. Certiorari should be granted, and this decision should be reversed.

Respectfully submitted on May 3, 2000,

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES BUTTS, RAY COOPER, SHANE TALBOT, RAYMOND BENNETT and MICHAEL CROSBY, *Petitioners*,

v.

JAMES McNALLY and JAMES JOHNSON BEY, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF GRANT OF CERTIORARI

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JAMES McNALLY and JAMES JOHNSON BEY, *Respondents*.

INTEREST OF AMICUS CURIAE

Relying primarily on its own analytically unsound decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. (*en banc*) 1992), the Ninth Circuit Court of Appeals has ruled in this case that non-compliance with *Miranda* can violate the Fifth Amendment and may result in *personal* civil liability. This specter of personal liability will inevitably have a chilling effect upon California's 67,000 sworn peace officers as they investigate criminal cases. In addition, the Ninth Circuit appears to be the only federal circuit to have approved potential civil liability for the type of conduct involved in this case; and the ruling contradicts numerous pronouncements from this Court. Accordingly, the State of California has a solemn obligation to seek its correction.

SUMMARY OF ARGUMENT

Miranda's procedures are not themselves constitutional rights. Accordingly, a "violation" of them — even an intentional one — may not give rise to civil rights liability under Title 42 U.S.C. § 1983. Further, even assuming that police engage in coercive conduct during custodial interrogation, their conduct will not support a civil rights cause of action unless it "shocks the conscience," and even then only under the Due Process clause of the Fourteenth Amendment, as opposed to the self-incrimination clause of the Fifth Amendment. Accordingly, the Ninth Circuit has erred egregiously in finding (1) that the conduct involved in this case — which the trial court has already ruled did *not* shock the conscience — can support a civil rights action at all, let alone under the *Fifth* Amendment, and (2) that the law in this area has been so clear and well-established that the officers involved were not entitled to qualified immunity for their conduct.

THE NINTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY TO PETITIONERS BECAUSE THE LAW HAS NEVER BEEN CLEARLY ESTABLISHED THAT IT IS POSSIBLE FOR PEACE OFFICERS IN THE FIELD TO VIOLATE A SUSPECT'S FIFTH AMENDMENT RIGHT AGAINST COMPULSORY SELF-INCRIMINATION

A. Introduction

The Ninth Circuit denied qualified immunity to petitioner police officers because, at the time they conducted the interrogations at issue (1991 for respondent Bey, and 1993 for respondent McNally), a reasonably trained police officer would have known, under "clearly established" law, that the conduct they engaged in — to wit, intentionally "violating" *Miranda* by continuing to question these suspects after they had invoked their right to counsel, in combination with making "false" and "misleading" promises about immunity and, in one case, making disparaging comments about attorneys — constituted a violation of the Fifth Amendment. "Officers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions." *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. (*en banc*) 1999).

Amicus State of California contends that the Ninth Circuit erred as a matter of law in that: (1) a *Miranda* violation does not violate the Constitution; (2) although it is possible for police in the field to violate the Constitution, namely, the *Fourteenth* Amendment, their

conduct must "shock the conscience;" and (3) even "conscience-shocking" conduct in the field cannot violate the *Fifth* Amendment's privilege against compelled self-incrimination, which was the only ground before the Circuit Court.

B. A Violation Of *Miranda*'s Procedures, By Itself, Does Not Constitute A Violation Of The Constitution

Noncompliance with *Miranda*'s procedures — even intentional noncompliance — does not violate the Constitution because, as this Court has repeatedly observed, *Miranda*'s only *holding* dealt with the admissibility of evidence, and *Miranda*'s procedures are not themselves constitutional rights.

1. *Miranda*'s Only *Holding* Dealt With The Admissibility Of Evidence

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court recommended certain "procedural safeguards" as a means of obtaining a statement that would be *admissible* at trial without violating the suspect's Fifth Amendment right against self-incrimination. Indeed, *Miranda* itself, as well as numerous subsequent opinions from this Court, have emphasized that the *admissibility of evidence* was the only *holding* of that case:

> . . . [W]e deal with the *admissibility* of statements obtained from an individual who is subjected to custodial police interrogation . . . .

Miranda, at 439 (emphasis added).

> Our holding . . . briefly stated . . . is this: the prosecution may not *use* statements . . .

> stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Miranda, at 444 (emphasis added).

> The constitutional issue we decide in each of these cases is the *admissibility* of statements obtained from a defendant questioned while in custody . . . .

Miranda, at 445 (emphasis added).

> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the *admissibility* of any statement made by a defendant.

Miranda, at 476 (emphasis added).

> In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses *cannot be introduced into evidence* to establish his guilt.

Berkemer v. McCarty, 468 U.S. 420, 429 (1984) (emphasis added).

> When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be *excluded from evidence at trial* in the State's case in chief.

Oregon v. Elstad, 470 U.S. 298, 317 (1985) (emphasis added).

2. *Miranda*'s Procedures Are Not Themselves Constitutional Rights

With like consistency, this Court has repeatedly observed that *Miranda*'s procedures, while integral to the protection of a criminal defendant's Fifth Amendment right at *trial*, are merely prophylactic in nature and are not themselves constitutional rights. Accordingly, the failure by police to follow them, by itself, cannot be sufficient to support a section 1983 civil rights action:

> The Court recognized [in *Miranda*] that these procedural safeguards were not themselves rights protected by the Constitution.

Michigan v. Tucker, 417 U.S. 433, 444 (1974).

> The Court in *Miranda v. Arizona* imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution.

New York v. Quarles, 467 U.S. 649, 657 (1984).

> The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution.'

New York v. Quarles, 467 U.S. at 654.

> The right to counsel established in *Miranda* was one of a series of recommended procedural safeguards that were not themselves rights protected by the Constitution.

Davis v. United States, 512 U.S. 452, 457 (1994).

This principle applies with equal force, of course, to the *Miranda* "rule" at issue here, i.e., the requirement that police scrupulously honor a suspect's invocation of rights by immediately ceasing all further interrogation:

> It remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.

Connecticut v. Barrett, 479 U.S. 523, 528 (1987).

In conformance with these clear pronouncements, virtually all federal circuits, including the Ninth, have recognized that *non-coercive* non-compliance with *Miranda*'s procedures does not violate the Fifth Amendment, or any other Amendment, of the United States Constitution:

> This case does not establish a [section 1983] cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak.

Cooper v. Dupnik, 963 F.2d 1220, 1244, 1252.

> [V]iolations of the prophylactic *Miranda* procedures do not amount to violations of the Constitution itself.

Giuffre v. Bissell, 31 F.3d 1241, 1256 (3rd Cir. 1994).

> The remedy for the alleged *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a civil rights action.

Brock v. Logan County, 3 F.3d 1215, 1217 (8th Cir. 1993). *See also Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989) (*en banc*), *cert. denied*, 490 U.S. 1091.

Accordingly, amicus submits that the Ninth Circuit erred in creating an exception to this principle, to

wit, that if a *Miranda* violation is *intentional*, this renders the resulting statement "coerced" and "involuntary," violates the Fifth Amendment, renders the statement inadmissible for any purpose, and exposes the offending officer(s) to potential *personal* civil rights liability.

C. Although It Is Possible For Police Conduct In The Field To Violate The Fourteenth Amendment, The Conduct Must "Shock The Conscience," Which Petitioners' Conduct Clearly Did Not Do

Obviously, it is *possible* for police in the field to engage in conduct which would render a resulting statement "involuntary" and therefore inadmissible at trial, for instance, by actually coercing the statement through the use of physical force, psychological mistreatment, threats, or official "inducements," such as promises of leniency, benefits, or immunity. *Miller v. Fenton,* 474 U.S. 104, 109 (1985); *Shotwell Mfg. v. United States*, 371 U.S. 341, 348 (1963); *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (1997).

However, contrary to the Ninth Circuit's view, not *all* "coercive" police conduct is sufficient to violate a person's civil rights. Stated another way, police conduct may well be sufficiently coercive to render a suspect's statement inadmissible against him at his criminal *trial*, yet still be *in*sufficiently coercive to constitute a violation of the *Constitution* for which the suspect can sue civilly and receive monetary compensation.

Indeed, it has long been the rule that only governmental conduct which "shocks the conscience," i.e., "offends the community's sense of fair play and decency," rises to the level of a constitutional violation, namely, a substantive violation of the Due Process clause of the *Fourteenth* Amendment, as opposed to a violation of the

compulsory self-incrimination clause of the *Fifth* Amendment. *Rochin v. California*, 342 U.S. 165, 172 (1952). *See also Fagan v. Vineland*, 22 F.3d 1296, 1303 (3rd Cir. 1994).

> [T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogation, . . . the Court has continued to measure confessions against the requirements of due process.

Miller v. Fenton 474 U.S. 104, 110 (citations omitted); *accord, Colorado v. Connelly*, 479 U.S. 157, 163 (1986).

Thus, in *Cooper v. Dupnik*, 963 F.2d 1220, 1244, because the majority found the police conduct to be sufficiently outrageous and "shocking," the Ninth Circuit properly upheld the plaintiff's section 1983 civil rights claim under the *Fourteenth* Amendment.[1/]

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1. In *Cooper*, the police admitted to having set out on a calculated plan to deliberately violate the suspect's constitutional rights and to wear him down until he confessed. They ignored his repeated requests to speak to an attorney and "relentlessly" interrogated him for hours, during which time Cooper "was reduced to a state of agitation and anxiety marked by tears and sobbing as he persistently maintained his innocence in the face of [the officer's] onslaught." Cooper was "hammered, forced, pressured, emotionally worn down, stressed, and infused with a sense of helplessness and fear-all in an effort to extract a confession." He was subjected to "sophisticated psychological torture," and his will was "overborne," all of which caused him to later suffer from post-traumatic stress syndrome. *Id.*, 963 F.2d at 1231, 1248. The tape-recorded interviews of Bey and McNally, on the other hand, lasted 15 minutes and 75 minutes, respectively, were conducted professionally and politely, and

In the case at bench, on the other hand, the Ninth Circuit never even discussed the "shock the conscience" standard, that is, it never addressed the question of whether a jury could find that the alleged police conduct, even if fully proven, could reasonably be viewed as offending the community's "sense of fair play and decency," which clearly it could not.

Rather, the Ninth Circuit simply found that the conduct alleged was sufficient to state a cause of action under the *Fifth* Amendment—which *was the only legal ground before it*—because (1) the *Miranda* violation was *intentional*, and (2) it occurred in *combination* with additional "coercive" conduct, to wit, the "false" and "misleading" promises that nothing the suspects said from that point on could be used against them, and, in one case, several pejorative comments disparaging the role of attorneys in the legal process.[2]

Regarding the first point, however, the fact that a police officer makes a conscious decision not to follow one of *Miranda*'s prophylactic directives, as opposed to merely negligently failing to do so, cannot somehow elevate his conduct to a violation of the *Constitution*. Indeed, contrary to the Ninth Circuit's assertions that an intentional violation of *Miranda* renders any subsequent

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contained no indication that either suspect was physically uncomfortable or emotionally upset.

2. In its recent decision in *Henry v. Kernan*, 197 F.3d 1021 (9th Cir. 1999), the Ninth Circuit went even further by granting habeas corpus relief, on the basis of a *Fifth* Amendment violation, where the offending officer did no more than intentionally ask the suspect, who had just invoked his *Miranda* right to counsel, an additional question, which resulted in a damaging admission. Even though this initial incriminatory statement by the suspect was clearly "voluntary" by traditional standards since no other arguably "coercive" conduct had occurred as of that point, the Ninth Circuit found it to be "involuntary" and therefore inadmissible due to the *intentional* nature of the *Miranda* violation. (*Id.*, at 1029.)

statement coerced and therefore "involuntary" under the *Fifth* Amendment (see *Henry v. Kernan*, 197 F.3d 1021, 1029, and *Cooper v. Dubnik*, 963 F.2d 1220, 1238-1244), this Court has said that "[a] *Miranda* violation does not constitute coercion" (*Oregon v. Elstad*, 470 U.S. 298, 306, fn. 1), and that "a *Miranda* violation 'does not mean that the statements received have actually been coerced, . . . '" *Arizona v. Fulminante*, 499 U.S. 279, 293, fn. 7 (1991).

In addition, as this Court recognized many years ago, although the rule of *Harris v. New York*, 401 U.S. 222 (1971), might tempt police to *deliberately* decide not to follow *Miranda*, any such choice would *not* preclude a resulting statement's use for impeachment purposes, so long as the statement was "voluntary" by traditional standards:

> One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have *little to lose* and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. *In any event, the balance was struck in Harris and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness.*

Oregon v. Hass, 420 U.S. 714, 723 (1975) (emphasis added).

Similarly, regarding the Ninth Circuit's second point, the officers' assurances that nothing the suspects

said from that point on would be used against them in court likewise patently fails to "shock the conscience." Indeed, in amicus' view, such assurances were not even "false" or "misleading," as the Ninth Circuit characterized them, but rather were self-fulfilling and therefore *true*. For if the government promises that a statement will not be used in court, then, out of fairness, *it may not be used*, and its admission into evidence will constitute a violation of *procedural* due process at *trial*. *See Doyle v. Ohio*, 426 U.S. 610, 618 (1976). In any event, nothing the officers did in this case—whether viewed individually or in combination—can fairly be characterized as "shocking the conscience."[3/]

Perhaps the Ninth Circuit overlooked this crucial Fourteenth Amendment standard because the trial

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3. Almost ten years ago, the Seventh Circuit provided the following cogent summary of this distinction between mildly coercive conduct and conduct so egregious as to give rise to a section 1983 civil-rights action:

> This [i.e., the applicability of the Fourteenth Amendment to police conduct during interrogation] is not to suggest that the federal courts should or will undertake to monitor the details of police interrogations, and to award damages whenever the police cross the line that separates coercive from non-coercive interrogation. The relevant liberty is not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation. We do not undertake to specify a particular threshold, a task that may well exceed our powers of articulation. *But it is a high threshold*, and to cross it Wilkins and plaintiffs like him must show misconduct that a reasonable person would find *so beyond the norm of proper police procedure as to shock the conscience*, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff.

Wilkins v. May, 872 F.2d 190 (7th Cir. 1989) (emphasis added).

(district) court had previously *dismissed* plaintiffs' claim under that Amendment, expressly ruling that petitioners' conduct did *not* shock the conscience. *See* Petition for Writ of Certiorari, Appendix B-1 and C-1. Or, perhaps, the Ninth Circuit avoided this vital discussion because it is so obvious that the conduct involved here did not reach the required "high threshold."

Regardless of the reason behind this omission, however, it represents a fundamental and far-reaching error, for it opens the door to potential civil liability, under the *Fifth* Amendment, based on nothing more than *mildly* coercive, "non-shocking" conduct, a result which, as will be shown next, conflicts with established authority.

D. Even "Shocking" Conduct In The Field Cannot Violate The Fifth Amendment

Regardless of how petitioners' conduct is characterized, amicus submits that it cannot have violated the *Fifth* Amendment, which, as has been noted, *was the only legal ground before the Ninth Circuit.*

As this Court and numerous circuit courts have recognized, the Fifth Amendment is a *trial* right, that is, it may be violated only when a statement that has been actually coerced, or presumptively compelled, *is admitted into evidence at trial:*

> . . . [I]n protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental *trial right*.'

Withrow v. Williams, 507 U.S. 680, 691 (1993) (original emphasis).

> The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants.

> Although conduct by law enforcement officers prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*

United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added).

> The Fifth Amendment does not forbid the forcible extraction of information but only the *use* of information so extracted as evidence in a criminal case—otherwise, immunity statutes would be unconstitutional.

Wilkins v. May, 872 F.2d 190, 194 (emphasis added); *accord*, *Mahoney v. Kersey*, 976 F.2d 1054, 1061-1062 (7th Cir. 1992).

> The dissents in *Cooper*, however, make persuasive arguments that the privilege against self-incrimination is not violated until the evidence is *admitted* in a criminal case.

Wiley v. Doory, 14 F.3d 993, 998 (4th Cir. 1994) (emphasis added); *accord*, *Giuffre v. Bissell*, 31 F.3d 1241, 1256.[4]

> While Fifth Amendment concerns can certainly be *implicated* prior to trial, the Supreme Court has declared that a Fifth Amendment *violation* occurs only when self-incriminating statements are *introduced at trial*, thereby compelling the defendant to 'become a witness against himself.'

Riley v. Dorton, 115 F.3d 1159, 1165 (4th Cir. 1997) (emphasis added).

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4. The three dissenting Judges in *Cooper* reviewed numerous Fifth Amendment cases and concluded that "it is the *use* of coerced statements that constitutes a Fifth Amendment violation," rather than the manner in which statements are obtained. *Id.*, at 1254 (original emphasis).

Accordingly, the Ninth Circuit erred egregiously in ruling that police conduct in the field—particularly conduct as mild as that involved here—can justify a section 1983 civil rights suit for a violation of the *Fifth* Amendment's privilege against compulsory self-incrimination.

E. Because The Law In This Area Has Never Been "Clearly Established," Petitioners Were Entitled to Qualified Immunity

The doctrine of "qualified immunity" shields police officers from individual liability, even for civil rights violations, unless the officers violate "clearly established statutory or constitutional rights . . . ." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In order to be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 638-639 (1987).

In light of the authorities previously cited, it seems ludicrous to find that a "reasonable" officer in this case would or should have known that intentionally continuing to question these suspects, in combination with a (true) promise that nothing the suspects said henceforth could be used against them and, in one case, with some disparaging remarks about attorneys, so clearly violated the *Constitution* that the officer would be exposing himself to potential *personal* civil liability.

Indeed, as the Fourth Circuit noted upon looking back at the Ninth Circuit's 1992 *Cooper* case:

> The disagreement between the judges of the Ninth Circuit as to the correct interpretation of the relevant constitutional principles indicates

> that *even at the time of the Cooper decision, the law was not clearly established.*

Wiley v. Doory, 14 F.3d 993, 998 (emphasis added).[5]

Thus, while it is clear that the officers here violated one of *Miranda*'s safeguards, it is far from clear that their conduct violated any part of the United States Constitution, much less the Fifth Amendment's privilege against compelled self-incrimination. Accordingly, the Ninth Circuit erred in not granting qualified immunity to the petitioners; and unless this Court acts to correct this error, the specter of potential *personal* civil liability under the Fifth Amendment for *Miranda* errors will have a far-reaching and adverse effect upon law enforcement all across this nation.

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5. Obviously, the lack of clarity continues, as evidenced by the controversy surrounding the case of *Dickerson v. United States*, No. 99-5525, currently pending before this Court.

CONCLUSION

Whether in 1991, 1993, or today, there has never been "clearly established" law to the effect that what the police did here violated *any* constitutional right of the plaintiffs, particularly not the Fifth Amendment. Indeed, to the extent the law has been "clearly established," it indicates quite the contrary, namely, (1) that police non-compliance with *Miranda* does not violate the Constitution, (2) that the Fifth Amendment's right against compelled self-incrimination is *violated* only when a compelled or coerced statement is *introduced at trial*, not when an officer *obtains* it in the field; and (3) that the "coercive" conduct in this case does not "shock the conscience" and in fact was so *de minimus* as to result, at most, in statements that were inadmissible at trial.

Accordingly, amicus State of California submits that the Ninth Circuit erred in finding that the respondents have adequately alleged a civil rights cause of action under the Fifth Amendment, and in denying qualified immunity to the petitioner-officers. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

Dated: May 2, 2000.

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No. 99-1594

In The

Supreme Court of the United States

JAMES BUTTS, et al.,

Petitioners,

v.

JAMES McNALLY and JAMES JOHNSON BEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether police officers may escape a federal civil rights trial for coercing inculpatory statements from suspects in custody, where the statements were actually used by prosecutors, where the state courts have already found constitutional violations, and where the district court has found sufficient evidence of actual coercion to warrant a trial.

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INTRODUCTORY STATEMENT

Respondents James McNally and James Johnson Bey brought this action to redress abusive and coercive police misconduct. During in-custody interrogations, police officers extracted incriminating statements from both McNally and Bey, with the intent of using those statements against them at trial. State courts have already determined that both statements were involuntary.

As one element of their proof of coercion in this civil rights case, respondents introduced evidence that police officers deliberately interrogated them "outside *Miranda*" – specifically, that the officers, after administering the warnings required by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), intentionally refused to honor the respondents' repeated requests to remain silent and to have counsel present. Respondents McNally and Bey produced evidence that this misconduct was not inadvertent but, rather, was undertaken pursuant to municipal policies by which officers were affirmatively trained to disregard suspects' invocation of their *Miranda* rights, in order to obtain incriminating statements for use at trial. These policies form the basis of respondents' claims under *Monell v. Dept. of Social Services of City of New York*, 429 U.S. 1071 (1977) against the cities of Los Angeles and Santa Monica, asserting that these municipalities encouraged their officers to use coercive interrogation tactics upon citizens not charged with any criminal offenses.

In addition, the officers employed a variety of coercive tactics including false promises, profanity, disparaging comments about counsel, suggestions of harsher punishment and physically threatening gestures. For example, after being advised of his *Miranda* rights, respondent McNally requested to see an attorney not less than four

times. On each occasion, police denied him counsel; he was told instead by petitioner Talbot, "Okay, and fuck your attorney. It's just – I don't care about him anymore . . . [a]s far as I'm concerned, you know, [attorneys] really mess up the system." The officers then falsely promised McNally that because he had asserted his rights, it was entirely safe for him to speak. McNally gave a statement after he was subjected to these coercive tactics.

Contrary to the representations of petitioners and their *amici*, then, this case is not about whether police officers may be subjected to liability simply for failing to comply with the dictates of *Miranda*. As the district court and the court of appeals both recognized, respondents have come forward with evidence of actual coercion under the Fifth Amendment, and not merely conduct that is presumptively coercive under *Miranda* and its progeny. Both lower courts determined that respondents' claims involve disputed issues of fact, not law, and that the respondents have put forth sufficient evidence to entitle them to a trial. The district court ruled that "there is a genuine issue of material fact as to whether or not Plaintiffs McNally and Bey were coerced into speaking by police officers during custodial interrogation, in violation of Plaintiffs' Fifth Amendment right against self-incrimination." Pet. App. B2. The court of appeals affirmed, holding that:

> [C]oercion has been claimed and the question whether it occurred remains to be tried; the district court held that McNally and Bey had raised a material issue of fact on that point, and denied summary judgment. The district court's ruling is not surprising, in light of the fact that the state trial court suppressed McNally's statement even for impeachment purposes, and that

> the state appellate court expressly concluded that Bey's statement was coerced.

Pet. App. A17 (footnote omitted).

Neither the district court nor the court of appeals held that a violation of *Miranda*, in and of itself, gives rise to a civil rights action under 42 U.S.C. §1983. The lower courts simply held that the officers' conduct in this case – through which they extracted statements that officers intended to be used and that were in fact later used in court – established a genuine issue of material fact as to actual coercion. Petitioners and their *amici* are therefore incorrect in asserting that the lower court decisions establish a constitutional right of action for violation of *Miranda* alone. *See* Pet. i, 15, 24-25. Whether or not the deliberate failure to abide by *Miranda* suffices to give rise to a federal civil rights claim, though perhaps an interesting issue, is not the issue in this case. The issue presented here is simply whether the petitioner officers may escape liability, and receive qualified immunity, where there is a triable issue as to whether they intentionally subjected respondents to unconstitutional coercion. To be sure, the officers' use of *Miranda* as a sword rather than a shield constitutes a part of respondents' proof of coercion; it is by no means, however, their only proof.

Accordingly, petitioners are wrong to argue that this case raises the question whether violation of *Miranda* gives rise to a constitutional claim. The real question is whether intentional refusal to adhere to its strictures may constitute any part of plaintiffs' evidence in support of their claim of illegal coercion. As this issue has already been resolved by this Court, and there is no conflict among the lower courts, this case presents no issues worthy of review.

STATEMENT OF THE CASE

The respondents brought their lawsuit against the individual officers who questioned them, the Chief of the Santa Monica Police Department, and the Cities of Santa Monica and Los Angeles.[1] Respondents McNally and Bey's complaint asserted three claims against petitioners: that the officers coerced statements from them, in violation of the Fifth Amendment; that the officers forced them to give involuntary statements, in violation of the Fourteenth Amendment; and that the officers' conduct shocks the conscience, also in violation of the Fourteenth Amendment. The district court denied the petitioners' motions to dismiss on the basis of qualified immunity and held that the complaint indeed stated claims. *See California Attorneys for Criminal Justice ("CACJ") v. Butts*, 922 F. Supp. 327, 334-38 (C.D. Cal. 1996). On summary judgment, the district court reaffirmed its earlier denial of qualified immunity (*see* Pet. App. B5-B6), but dismissed the Fourteenth Amendment claims. *See* Pet. App. B4-B5, C7. The court granted the petitioners' motions for summary judgment on the Fourteenth Amendment "involuntariness" claim, finding that it was entirely subsumed in the Fifth Amendment claim and thus subject to dismissal under *Albright v. Oliver*, 510 U.S. 266 (1994). Pet. App.

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[1] California Attorneys for Criminal Justice and the Criminal Courts Bar Association, two bar associations, also sought injunctive relief. The district court dismissed their claims for lack of standing. The district court also dismissed the causes of action against the Chief of the Los Angeles Police Department and law enforcement trainer Devallis Rutledge. These dismissal orders are not before this Court on this interlocutory appeal.

C7.[2] The court denied summary judgment on the respondents' Fifth Amendment claim, determining that "[t]he Fifth [A]mendment claim . . . is appropriate for resolution before a jury, on a fully developed record." Pet. App. B4. The court of appeals affirmed the denial of summary judgment, appropriately noting that review of unresolved issues of fact is inappropriate on an interlocutory appeal. Pet. App. A18, A24.

In allowing the Fifth Amendment claim to proceed to trial, the district court emphasized that the respondents have produced evidence of actual coercion, and not merely conduct that is presumptively coercive under *Miranda*. *See* Pet. App. B3 ("a mere violation of *Miranda* is not, without more, a violation of the Fifth Amendment"). As set forth in the district court's summary of the facts:

> [T]he detectives purposely continued to question Plaintiffs after they had invoked their rights to silence and to counsel under *Miranda*. The detectives interrogating McNally explicitly demeaned the role of defense counsel when McNally invoked his right to an attorney. In each case, the interrogating detectives told Plaintiffs that their post-invocation statements could not be used against them. In each case, however, Plaintiffs' statements were ultimately used against them by prosecutors. These facts raise a genuine issue of material fact as to whether the detectives' questioning was coercive. . . .

Pet. App. B3-B4 (footnotes omitted). To demonstrate the evidentiary basis for the district court's determination

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[2] This ruling is not before this Court on this interlocutory appeal.

that there exists a triable issue of material fact, we briefly review each respondent's interrogation.

1. The interrogation of James McNally

Santa Monica police detectives interrogated respondent McNally for over an hour in an Arizona jail. Pet App. A6. He was advised of his *Miranda* rights before questioning turned to whether he would waive extradition and the degree of the crime that might be charged. *Id.* As set forth in the court of appeals decision, the tape transcript of the interrogation reveals that McNally attempted to assert his right to counsel and to remain silent no less than six separate times. *Id.* at A6-A11.[3] The two officers repeatedly responded to McNally's requests to see counsel by vigorously condemning defense attorneys, one officer stating at one juncture that he "[did]n't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either." *Id.* at A8. The interrogation proceeded as follows:

> McNally: How 'bout we do this? How 'bout I'll waive extradition. I'll go with "you's." [1] Let me talk to a California lawyer and we'll get back together.
>
> D1:[4] You'll what?

---

[3] The places where McNally asked to speak with an attorney and remain silent are noted by bracketed numbers in the quoted text below.

[4] D1 is petitioner Detective Cooper; D is petitioner Detective Talbot.

McNally: Okay. I'm saying, "I'll waive extradition. I'll go with 'you's" no hassle, no problem. . . .

D: Okay. Under, understand. . . .

McNally: So . . .

D: . . . understand what happens when you get to California – when you get your attorney. No attorney in his right mind is gonna' tell you to talk with the police.

McNally: Oh, I know . . .

D: Justice works the same way as it does on the East Coast.

McNally: No, I, I understand. [2] I, I just wanna' clarify a couple things in my mind. I, I know that. I know a lawyer's not gonna' tell me to talk to "you's."

D: Right.

McNally: I know that. [3] Let me just talk to him about a couple – you know, I know Pennsylvania Law just 'cuz I've been through it. I don't know California Law. I don't . . . [4] let me talk to him a little bit and we'll get back – I promise I'll get back together with "you's."

D: So, you don't wanna' . . .

D1: You're not gonna tell us . . .

D: . . . you don't wanna tell us what happened . . .

McNally: [5] No . . .

D: . . . now?

McNally: . . . not at this time. It's, it's too scary for me right now. [6] I'd, I'd rather talk to a lawyer.

D: Alright.

McNally: I'm not trying to impede your investigation.

D: No, I understand.

McNally: I'll with "you's" . . . [sic]

D: I understand.

McNally: . . . no hassle . . .

D: Okay, now, let me, let me explain to you what's happened. You've basically invoked your Right to have an attorney . . .

McNally: Right.

D: . . . okay? At this point, nothing that you say can be used against you in Court . . . in California because you have invoked your Right to have an attorney.

McNally: Right.

D: I still would like to know what happened now because – well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

So, basically, what they'll do is they'll play a game of "what's this case worth?" And they'll do "make, let's make a deal type thing."

McNally: I know.

D: What I wanna' know from you now is what you might tell me later so I know what you tell me later is the same as what you're gonna tell me now because what you tell me later is gonna' be on the record.

D1: This is all on tape. This – what we're tellin' you. You've invoked your Rights. Everything from this point on . . .

D: Cannot . . .

D1: . . . regarding this case cannot be used against you. We're, we're making you the guarantee. It won't . . . you know, even though its on tape. . . .

McNally: Shut that thing off then.

D: Well, this is the record of what you're telling us. You, we . . .

D1: Yeah. It's also the record of you invoking your Rights. You want an attorney . . . which is fine . . .

D: And it's – let me explain to you something else. Basically, what this does is validate for you and for the District Attorney that what you tell me now is what you're gonna' tell – hopefully, tell us later. 'Cuz the evidence will bear out, I think, what I, I already know.

So, once we start a tape, we don't turn it off. If you wanna' turn off the tape than we stop the conversation and, and we'll go ahead. . . .

D1: See . . .

D: . . . and do the process. I just wanted to explain to you and I'm not trying to be "hard ass" about this. It's just the way I work. I know it's the way the District Attorney that I'm working with, uh, Richard Stone, works. We just – and if you were in our place, would you trust something

that somebody told you after they talked to an attorney?

D1: It's like "black mail" with attorneys. Man. We know that.

D: . . . I mean, I mean, first of all, if you could trust the attorney that you're working with he's gonna', and if you can work and if you tell him the truth, he gonna' work with you somehow to make a better deal, okay?

McNally: (no audible response).

D: They're, the deal is here. It's up to them . . .

D1: It's . . .

D: . . . it's up to them to talk about it. The only thing is, everything that falls after this – we'll go in one direction based on the physical evidence and the statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna push it.

McNally: Right.

D: Okay, and fuck your attorney. It's just – I don't care about him anymore.

McNally: Yeah.

D: Okay. As far as I'm concerned, you know, they really mess up the system. I wanna' know now what you're going to tell me later. It can't be used against you. We . . .

D1: This is your opportunity.

D: . . . told you that.

D1: And it's – this is your opportunity and it's not gonna' be used against you. If you . . .

D: If you want, you can write it out and start it with "The Detective told me this statement cannot be used against me . . . " I'll sign it and I'll make a xerox copy of it and you can have a xerox. It's up to you. I'm not trying to trick you here.
(pause)

McNally: Alright. I'll . . . and this can't be used against me.

D1: No, absolutely. It's right on there. It's not – we're promising you, it's not gonna' be used against you – in the case in chief – against you, okay? Just, this is for our edification of what happened.

Id. at A6-A11.

At trial, McNally successfully moved to suppress his inculpatory statement as coerced and involuntary. *Id.* at A11. Notwithstanding that the two Santa Monica officers had assured respondent that any statement he gave is "not gonna' be used against you," the prosecutor used the statement at sentencing to argue that McNally's assertions of self-defense should be treated as an aggravating factor. *Id.*

2. The interrogation of James Johnson Bey

Los Angeles police interrogated Bey after he had been handcuffed to a bench at the police station for four hours. Pet. App. A11-A12. Bey was not given *Miranda* warnings until after the interrogating officers had begun

asking details regarding his case. ER 281-82.[5] Immediately after being advised of his *Miranda* rights, Bey stated that "I won't have another word to say until I have an attorney." *Id.* at A12. He repeated his request to speak with an attorney and to remain silent no less than five times. *Id.* at A12-A13.[6] The two officers questioning him, petitioners Bennett and Crosby, neither honored his request nor suspended their interrogation until Bey made statements. *Id.* Bey testified in his deposition that Bennett used physically threatening gestures, spoke in a loud and angry tone of voice, adopted a "sinister" and "condemning" tone, and at one point threatened the death penalty by saying, "We're going to drop the pill on you." *Id.* at A13-14; SER 75-80.[7] The transcript of the taped interrogation reads in pertinent part as follows:

> Bey: Am I being charged with murder? If I'm being charged with murder, then [1] I won't have another word to say until I have an attorney.
>
> D:[8] Is that – ah – your feelings? Do you – That's why I questioned you, do you wish to –

---

[5] References to "ER" are to Defendants' Excerpts of Record, filed with the court of appeals.

[6] The places where Bey asked to speak with an attorney and remain silent are noted by bracketed numbers in the quoted text below.

[7] References to "SER" are to Plaintiffs' Supplemental Excerpts of Record, filed with the court of appeals.

[8] "D" is Detective Bennett; "U" is an unidentified detective, alleged to be Detective Crosby. Spaces marked as "***" were designated as unintelligible in the transcript.

Bey: * * * if you read me those rights, you must be gonna charge me with something. So I'll wait and see what happens. [2] I won't say another word until I have an attorney.

D: Well, like you say yourself, James, you're a suspect.

Bey: Well, if I'm being charged with something, [3] I'd rather not have anything else to say until I have an attorney.

D: Okay?

Let me explain something to you, James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use them in court.

U: I think James is familiar with out * * * outside Miranda. Are you familiar with that, James?

Bey: I don't – I don't know too much about the law. [4] I'm just telling you I know to keep my mouth shut * * * somebody to put me in jail.

D: Well, James, I'll tell you what, there's a lot of physical evidence which doesn't lie, James.

Do you know why we were so long before we got here to talk to you?

Bey: No, I don't. I know that you all were in my apartment looking around. I don't know what you were looking for.

D: Not only looking around. We were in your apartment with our what they call Scientific Investigation Division people, or personnel. These are experts in getting physical evidence.

Bey: Uh-huh.

D: And we got some very incriminating physical evidence, my friend.

Bey: * * *

D: Stuff that can't be explained away.

Bey: Well, we'll have to see what happens. [5] But I'm not gonna say nothing * * * an attorney * * *

D: Why don't you tell me what happened that night?

Pet. App. A12-A13.

At trial, Bey testified and the prosecution introduced his statement to impeach him. *Id.* at A14. On direct appeal, the California Court of Appeal, upon review of the uncontradicted evidence, stated: "We . . . are compelled to conclude that under these circumstances, appellant's statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony." *People v. Bey*, 21 Cal. App. 4th 1623, 1628, 27 Cal. Rptr. 2d 28, 31 (1993). The state appeals court characterized this as "a very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to [Bey] about the legal consequences of that violation." *Id.* It specifically remarked that petitioner Bennett had intentionally violated *Miranda* in order to impeach Bey's testimony, and that the tactic had been taught police at a training seminar:

> At trial, outside the presence of the jury, Detective Bennett testified that he had continued to question appellant "[s]o that if he did take the stand, his testimony could be impeached." Appellant's attorney asked: "Have you attended any seminars where it was suggested as a tactic to keep asking questions to a suspect after they invoke their rights?" Detective Bennett answered "Yes." He explained that the substance of what he was told at the seminar was:

> "In essence, you do want to get a statement for the expressed purpose that I just stated."

Id. at 1627. The state court of appeal nevertheless held the error to be harmless and affirmed Bey's conviction. *Id.* at 1629.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Court has long held that evidence of *Miranda* violations is probative of actual police coercion.

As part of their evidence submitted in opposition to the petitioner officers' motion for summary judgment, respondents offered the undisputed tape transcripts of their custodial interrogations. These transcripts reveal police tactics deliberately designed to coerce inculpatory statements for use at trial. In each case, the coercion was effected in the same way: Two officers teamed up on one suspect and interrogated him "outside *Miranda*." Officers deceitfully promised, through the administration of *Miranda* rights, that each person possessed both a right to remain silent at any point during the interrogation and a right to consult with an attorney which, once asserted, would instantly terminate all police questioning. In fact, under the policy followed by the two police departments, this promise was false. Interrogating officers in both departments are affirmatively trained on how to extract information from suspects even after they have asserted their *Miranda* rights. Consistent with this training, petitioner officers continued to apply vigorous pressure to both suspects until statements were extracted, overwhelming McNally's and Bey's attempts to remain silent and to obtain the assistance of counsel.

To make matters worse, the petitioner officers coupled their already-coercive tactic with the false promise that, because the respondents had asserted their Fifth Amendment privilege, it was safe for them to speak. As both the federal district court and the court of appeals emphasized, state courts held in each case that the statements derived were involuntary and coerced. Pet App. A11, A14, B4. Respondents' wills were overborne by the ferocious pressure the officers applied, even after the suspects had asserted their Fifth Amendment rights.

In considering these tactics as part of the respondents' proof of coercion, the courts below broke no new ground. This Court held in *Miranda v. Arizona*, 384 U.S. 436 (1996), and has since reaffirmed numerous times, that the requirements of administration of *Miranda* warnings and, concomitantly, the requirement that "the exercise of those rights must be fully honored," derive directly from its "conclu[sion] that without proper safeguards the process of incustody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.[9] *See also Withrow v. Williams*, 507 U.S. 680, 689 (1993); *Illinois v. Perkins*, 496 U.S. 292, 296-97 (1990). As then-Justice Rehnquist stated, "[t]he *Miranda* decision was based in large part on this Court's view that the warnings which it required police

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[9] *See also id.* at 469 ("[W]hatever the background of the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.").

to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house." *New York v. Quarles*, 467 U.S. 649, 656 (1984) (citing *Miranda*, 384 U.S. at 455-58). Indeed, "[f]ailure to administer *Miranda* warnings creates a presumption of coercion." *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). As the Court further explained in *Moran v. Burbine*, 475 U.S. 412 (1986):

> [T]he Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion.

Id. at 426 (citing *Quarles*, 467 U.S. at 656.).

While the violation of *Miranda*'s procedures creates a presumption of coercion, this Court has repeatedly held that compliance with *Miranda* is also probative of **actual** coercion. In *Davis v. North Carolina*, 384 U.S. 737 (1966), this Court ruled a confession involuntary under the Fourteenth Amendment, stating:

> [T]hat a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness. *Haynes v. Washington*, 373 U.S. 503, 510-511 (1963); *Culombe v. Connecticut*, 367 U.S. 568, 610 (1961); *Turner v. Pennsylvania*, 338 U.S. 62, 64 (1949). See also *Gallegos v. Colorado*, 370 U.S. 49, 54, 55 (1962). Thus, the fact that Davis was never effectively advised of his rights gives added weight to the other circumstances

> described below which made his confessions involuntary.

Id. at 740-41. In *Withrow*, this Court expressly noted that courts look at the totality of circumstances to determine whether a confession was voluntary, and those circumstances "include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation." *Withrow*, 507 U.S. at 693-94. These principles were applied in *Mincey v. Arizona*, 437 U.S. 385 (1978), where this Court found a statement to be involuntary based in part upon the fact that the accused's request for counsel was ignored. *Id.* at 399-401.

In this case, the evidence regarding petitioner officers' conduct easily supports the district court's determination that, at minimum, there is a genuine issue of material fact as to unconstitutional coercion. Far worse than no administration of the *Miranda* warnings at all, the police misconduct here twists *Miranda* itself into an instrument of coercion. During the interrogations of both respondents, the police officers had no sooner pronounced the rights of an in-custody suspect to remain silent and to speak with an attorney, when they proceeded to extinguish those rights. In these circumstances, the coercive power of the interrogating officer to deny a suspect's rights would appear absolute. Nothing the individual can say or do will end the interrogation, other than to make a statement that will satisfy the interrogating officers. A suspect's familiarity with *Miranda* only heightens the unconstitutional duress; the individual knows that a vital right is being denied to him, and therefore that he has little recourse but to make a statement. Thus, although this Court in *Miranda* has mandated

that "if a person in custody is to be subjected to interrogation, he **must** first be informed that he has the rights to remain silent" as "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere" (384 U.S. at 468, emphasis added), the unmistakable message communicated by deliberate police defiance of this directive is that not even the Supreme Court can control officers bent on having their way.

Nor are any new legal principles implicated by the use of evidence of the deliberate denial of requests for counsel as proof of unconstitutional coercion. In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court recognized that "*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' " *Id.* at 485 (quoting *Miranda*, 384 U.S. at 474). As Chief Justice Rehnquist later explained the rationale for this rule:

> *Edwards v. Arizona* added a second layer of protection to the *Miranda* rules, holding that 'when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogations even if he has been advised of his rights.' *Edwards* thus established another prophylactic rule **designed to prevent police from badgering a defendant** into waiving his previously asserted *Miranda* rights.

Michigan v. Harvey, 494 U.S. 344, 350 (1990) (emphasis added, citations omitted). *See also Davis v. United States*, 512 U.S. 452, 458 (1994); *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990). As *Davis v. North Carolina, Withrow*, and

Mincey make clear, badgering in violation of *Miranda* and *Edwards* is a "significant factor" in assessing actual coercion.

Here again, the deliberate refusal by the police to honor repeated requests for counsel by individuals during custodial interrogation at a station house is probative of actual coercion, in violation of the Fifth Amendment. The dramatic and intentional eradication of the right by police reflects utter disregard of the individual suspect's will, not to mention the prophylaxis for the preservation of the right to be free from coercive interrogation. The officers' unauthorized and false assurances to the respondents, that because they invoked their rights it was safe for them to speak, transformed *Miranda* from a protective device into a powerful instrument used to overcome the suspects' explicitly stated desire to remain silent and speak with their attorneys.

That the courts below found the officers' egregious violations of *Miranda* to be probative of actual coercion does not mean, as petitioners assert (*see* Pet. 24-25), that the constitutional basis for this lawsuit is *Miranda*'s presumption of coercion. This case is about **actual** coercion, not just a violation of *Miranda*. While the circuits hold that there is no civil rights liability for technical *Miranda* violations where there is no credible evidence of actual coercion,[10] the circuits have long ruled that actual

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[10] *See Neighbour v. Covert*, 68 F.3d 1508, 1510 (2d Cir. 1995) ("failure to give *Miranda* warnings does not create liability under §1983"); *Lucero v. Gunter*, 17 F.3d 1347, 1351 (6th Cir. 1994) ("officer's failure to issue *Miranda* warnings cannot form the basis of a civil rights claim"); *Warren v. City of Lincoln, Nebraska*, 864 F.2d 1437, 1442 (8th Cir. 1989) (remedy for failure to read Miranda warnings is exclusion, not a §1983 action); *Bennett v.*

coercion may be grounds for liability under 42 U.S.C. §1983.[11] Actual coercion has been alleged here and the district court found sufficient evidence to require this Fifth Amendment claim to go to the jury.[12] In finding the deliberate violations of *Miranda* to be probative of actual coercion, particularly when coupled with false promises, threatening gestures, and other coercive tactics, the courts below have simply adhered to settled law.[13]

Passic, 545 F.2d 1260, 1263 (10th Cir. 1976) (mere failure to give *Miranda* warnings does not subject a police officer to liability under the Civil Rights Act); *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999) (failure to follow *Miranda* does not violate the Fifth Amendment and create a cause of action under §1983).

[11] *See Weaver v. Brenner*, 40 F.3d 527, 536 (7th Cir. 1994) ("if the confession is found as a fact to have been coerced, [this] violates [plaintiff's] constitutional rights and serves as a predicate for his §1983 action."); *Duncan v. Nelson*, 466 F.2d 939, 945 (7th Cir. 1972) ("[t]here is no indication that physical violence need be present to produce the coercion . . . cognizable under §1983"); and *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985) ("We also conclude that [plaintiff] has stated a constitutional claim arising from the . . . interrogation. Extracting an involuntary confession by coercion is a due process violation").

[12] The district court's ruling that the pretrial record establishes a genuine issue of material fact as to actual coercion may not be challenged in this interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

[13] For the same reasons, the pendency of *Dickerson v. United States*, No. 99-5525, should have no effect on whether certiorari is granted in this case. At issue here is whether the courts below correctly concluded that officers' refusal to honor suspects' express requests to remain silent and to speak with their attorneys, among other factors, may be considered as evidence

2. The petition raises no novel or substantial issues regarding qualified immunity.

It is well-established doctrine that a government official is entitled to qualified immunity only when "performing discretionary functions" and where his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The constitutional right sought to be vindicated here – not to be subjected to coercive in-custody interrogations – has long been recognized by the Court, well before even *Miranda* itself. *See, e.g., Escobedo v. Illinois* 378 U.S. 478 (1964); *Spano v. New York*, 360 U.S. 315 (1959); *Leyra v. Denno*, 347 U.S. 556 (1954); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936). The petitioners have sought to avoid this difficulty by mischaracterizing this case as involving solely a technical *Miranda* violation and not actual coercion. But, as set forth above, that is a fair description of neither the rulings below nor of the pretrial evidence adduced in the district court.

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of unconstitutional coercion. As the ACLU has argued as amicus curiae in *Dickerson*, the *Miranda* decision was entirely consistent with the law that this Court had developed in prior cases to determine whether the Fifth Amendment's prohibition against compelled self-incrimination had been violated; by contrast, 18 U.S.C. §3501 represents a departure from the traditional Fifth Amendment test for compulsion. But regardless of how *Dickerson* is resolved, it will not affect this case – under any test for compelled self-incrimination, respondents have raised a triable issue of fact here.

Moreover, even as to the requirement of the *Miranda* warnings, this Court has held that the rule that "questioning must cease if the suspect asks for a lawyer provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." *Davis v. United States*, 512 U.S. at 461. As the Court stated in *Withrow*:

> We must remember . . . that *Miranda* came down some 27 years ago. In that time, law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements. See *Quarles, supra*, [467 U.S.] at 663, (O'Connor, J., concurring in judgment in part and dissenting in part) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J. concurring in judgment)) (" 'meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures' ").

507 U.S. at 695 (citations omitted). *See also Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers) (*Miranda*'s " 'core virtue' " was " 'afford[ing] police and courts clear guidance on the manner in which to conduct a custodial investigation.' ") (bracket in original). Indeed, *Miranda* is perhaps the best known decision in the history of this Court, its "now familiar measures" phrased entirely in terms of what the police "must" say and what "rights must be afforded" to in-custody suspects during interrogation:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court

> of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement."

Withrow, 507 U.S. at 689-90 (quoting *Miranda*, 384 U.S. at 479).

Petitioners concede not only that the individual officers questioned respondents "outside *Miranda*,"[14] in order to obtain inculpatory statements, but also that the cities of Santa Monica and Los Angeles train their officers that they may do just that. *See* Pet. 5-6. Their remarkable argument that this training should immunize them from liability would eviscerate *Miranda*, turning its required warnings into discretionary pronouncements to be

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[14] The Santa Monica officers (Talbot and Cooper) claim that they question in violation of *Miranda* in very few cases. *See* Pet. 10. This claim is apparently based upon Talbot's declaration that he has questioned "outside *Miranda*" in fewer than 5% of all interrogations he has conducted. *See* Pet. App. G11. In this self-serving declaration, Talbot does not give the total number of interrogations he has conducted, nor does he indicate the number of interrogations in which a suspect has waived his or her rights. Talbot's declaration appears contrary to his own deposition testimony, where he could not recall how many times he questioned "outside *Miranda*" to gather intelligence or to obtain physical evidence. *See* SER 64-65. It also appears to undermine the parties' stipulation, in which Talbot's lawyer straightforwardly agreed that "Sergeant Cooper and Detective Talbot have questioned custodial suspects after they have asserted their *Miranda* rights." Pet. App. D4.

administered however and whenever individual officers so chose.[15] Of even more concern would be the broader message conveyed: that governmental entities could easily insulate their personnel from civil liability for violating clearly established rights recognized by any court, including this one, by simply training their agents to wilfully defy or disregard them.

For over sixty years, the law has been clearly established that officers may not coerce statements from suspects. *See Brown v. Mississippi*, 297 U.S. 278 (1936). If the issue raised in this case and addressed by the lower courts is correctly identified, it is readily apparent that the law on the subject is clearly established.

3. This case does not present an occasion to decide whether the Fifth Amendment may only be violated where coerced statements are used in court.

Respondents McNally and Bey have alleged violations of the Fifth Amendment, which guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The petitioner officers and their police trainer *amici*[16] belatedly argue that the Fifth

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[15] By comparison, in cases cited by petitioners, the *Miranda* violation was the result of "inadvertent disregard," not intentional violation (*Michigan v. Tucker*, 417 U.S. 433, 445 (1974)), or where there was "no claim that the statements made to the police were coerced or involuntary." *Harris v. New York*, 401 U.S. 222, 224 (1971).

[16] A brief was submitted for the State of California by Deputy Attorney General Joel Carey. Mr. Carey is a prominent law enforcement trainer on questioning "outside *Miranda*." *See*

Amendment right against self-incrimination may only be violated when coerced statements are used in court against them.[17]

This case is not the appropriate vehicle for resolving any arguable ambiguities in these authorities, since the coerced statements were not only intended to be used in criminal proceedings, but also **were in fact used** against both respondents in their criminal proceedings. Respondent Bey's statement was used against him at trial. He testified in his own defense and was cross-examined with his coerced statement. Pet. App. A14. Coerced statements may not be used for impeachment. *See New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979) (immunized testimony is inadmissible for impeachment). Further, under California law, statements admitted for impeachment are not limited to an assessment of credibility; rather, they are also evidence of the defendant's guilt. *See* Cal. Evid. Code

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Pet. App. E (reprinting Mr. Carey's own declaration and describing his training of police officers). A brief was submitted for the National Association of Police Organizations by Devallis Rutledge. Mr. Rutledge is also a prominent police trainer. *See* SER 127-33 (transcript of a training video featuring Mr. Rutledge). He was at one time a defendant in this lawsuit. Although his training may have influenced the defendant cities and the training of their officers, Mr. Rutledge was dismissed from the lawsuit because he did not participate in the interrogations or supervise the defendant officers. *See* ER 589-92.

In arguing that the Fifth Amendment does not apply in the station house, both Mr. Carey and Mr. Rutledge would seek to preserve their ability to train police officers on how to question suspects "outside *Miranda*" during a custodial interrogation.

[17] The petitioners made this argument in their reply brief in the court of appeals, but failed to make this argument in their opening brief.

§§1220, 1235. Thus, Bey's coerced statement was introduced into evidence in violation of the Fifth Amendment.

McNally's coerced statement was used by the prosecutor at sentencing to "to urge the court to consider as an aggravating factor McNally's assertions of self-defense in contradiction of his statement to the police." Pet. App. A11. The question of whether the Fifth Amendment applies at a sentencing hearing was decided by this Court last term in *Mitchell v. United States*, 526 U.S. 314 (1999). In *Mitchell*, this Court stated: "The Fifth Amendment by its terms prevents a person from being 'compelled in any criminal case to be a witness against himself.' To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327 (citation omitted). Irrespective of whether the Fifth Amendment applies in the station house, it undoubtedly applies when a prosecutor uses a coerced statement against the defendant in court at sentencing. McNally's statement was thus also used in court in violation of the Fifth Amendment.

Because their coerced statements were actually used against both respondents in criminal proceedings, this is not an appropriate case for deciding whether the Fifth Amendment is violated only when there is in-court use of compelled testimony.[18] Petitioners' contention that this

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[18] Moreover, even if the facts somehow supported a grant of certiorari on this issue, it is difficult to understand what review would accomplish. In *Withrow*, this Court noted that eliminating *Miranda* violations from habeas corpus would not benefit federal courts because interrogation practices are still reviewed when actual coercion is claimed. *See Withrow*, 507 U.S. at 693-95. In the case at bench, the district court dismissed the respondents' Fourteenth Amendment cause of action because it

case provides a vehicle for resolving a split between the circuits is therefore incorrect. *See* Pet. at 22-23. It is certainly true, for example, that the Third Circuit in *Giuffre v. Bissell*, 31 F.3d 1241 (3rd Cir. 1994), expressed doubts regarding the Ninth Circuit's *en banc* holding in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), that officers had violated clearly established Fifth Amendment rights by coercing incriminating statements from a suspect whose statements were never used at trial. In particular, the *Giuffre* court stated that *Cooper* "broke new ground" in upholding a §1983 claim based on the Fifth Amendment, "even though those statements were never used against the plaintiff in a court of law." 31 F.3d at 1256. While not expressly disagreeing with *Cooper*'s holding that such coercive police tactics could violate the Fifth Amendment, even if the statements were not used in court, *Giuffre* concluded that the law was not clearly established and therefore that the officers could avail themselves of qualified immunity.

This is not a proper case for resolving any arguable split, for the simple reason that the coerced statements in this case were both intended by interrogating officers to be used, and were in fact used by prosecutors, against the defendants in court. Thus, whatever test applies for determining both a substantive Fifth Amendment violation and qualified immunity, it is clearly satisfied here.

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was considered duplicative of the Fifth Amendment claim. If there is no Fifth Amendment cause of action here, the district court will be required to reverse its earlier ruling and permit the Fourteenth Amendment claim to proceed to trial.

Finally, even putting aside that the coerced statements of both respondents were used to their detriment in their criminal proceedings, petitioners' argument is contrary to *Miranda* and other holdings of this Court. *Miranda* was concerned with interrogation practices, not simply the admissibility of evidence: "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons is all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, 384 U.S. at 467. Other decisions from this Court establish that the Fifth Amendment can be violated when statements or testimony is coerced, even if there is no criminal trial. *See Michigan v. Tucker*, 417 U.S. 433, 440 (1974) ("Although the constitutional language . . . might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited.").[19] The question whether coerced confessions obtained by officers at the station house can violate the Fifth Amendment is settled, and does not warrant revisitation by this Court.

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[19] *See also Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (finding that architects called before grand jury cannot lose the right to enter public contracts because of their exercise of the privilege, stating, "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."); *Gardner v. Broderick*, 392 U.S. 273 (1968) (police officer may not be discharged due to assertion of the Fifth Amendment privilege).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 24, 2000

Respectfully submitted,

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No. 99-1594

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Respondents.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondents attempt to lull this court into denying this petition by mischaracterizing this as being just one more case about qualified immunity and alleged coercion. It is not. This case is about whether the remedy for *Miranda* violations should continue to be exclusion of improperly obtained evidence or about whether a new, civil remedy should be created. Unless reviewed, this case will nullify this Court's precedent establishing that Fifth Amendment violations occur only at trial, will compound confusion about the constitutional limitations on the police in conducting interrogations, and will signal to officers that they can no longer depend upon their state-certified training to avoid personal liability. Every case in which officers fail to follow *Miranda* procedures will become a potential civil rights trial on the issue of alleged coercion. Even worse, officers will either make individualized, personal judgments about constitutional limitations; or they will simply follow the safe course erring on the side of inaction. Crimes will not be solved. The guilty will not only commit perjury with impunity and go free; they will be rewarded with civil recovery. In short, the balance carefully struck by this Court during the last three decades will be destroyed. This Court should act now to protect that balance nationwide and to restore it in the Ninth Circuit.

I. Contrary To Respondents' Assertions, The Fifth Amendment Question Should Be Decided Now To Effectuate This Court's Precedent And Restore Uniformity In The Circuits.

Respondents argue that the issue of whether the Fifth Amendment can be violated at the station house need not be decided. They are mistaken. The Ninth Circuit entirely ignored this Court's precedent that the Fifth Amendment is a right that can only be violated at trial. And, neither the Ninth Circuit nor respondents make any attempt to reconcile this Court's rulings in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) and *United States v. Balsys*, 524 U.S. 666 (1998) with the assertion that the police can violate the Fifth Amendment at the station house during interrogation.

These cases and other Fifth Amendment jurisprudence establish that the suppression of a statement is the proper remedy for non-compliance with *Miranda* guidelines, and that a Fifth Amendment violation occurs only upon the erroneous admission of such a statement at trial. (See Petition pp.13-22). No Supreme Court case, however, holds that civil liability under the Fifth Amendment can result from station house interrogations. The instant petition presents an opportunity for this important issue to be decided

by this Court. [1]

II. Because The Interrogations In This Case Were Not 'Shocking To The Conscience,' The Detectives Should Not Be Civilly Liable Under Standards Governing The Admission Of Statements In Criminal Cases.

Based on the district court's review of the tape recorded interviews, the court concluded and granted summary judgment on the Fourteenth Amendment claim, stating that "[t]here is no evidence of behavior 'shocking to the conscience' in either case, or of conduct that is 'intentional, unjustified, brutal, and offensive to human dignity,' or that constitutes force that is 'brutal' and 'offends even hardened sensibilities.' " (Pet. App. B5).[2] The district court, however, believed

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[1] In a footnote respondents assert that review here would accomplish no practical result since a reversal would "permit the [dismissed] Fourteenth Amendment claim to proceed to trial." [Respondents' Opposition pp. 27-28 n. 18] Respondents fail to explain why this is so since the district court dismissed the Fourteenth Amendment substantive due process claim because the detectives did not engage in conscience shocking conduct.

[2] Even McNally admits that the police did not engage in "coercive" conduct. During a pre-trial telephone conversation in 1994, McNally telephoned Talbot to discuss the pre-trial probation officer's report and stated that Talbot had been "real honest" and "above board" with him. (Pet. App. G-20)

Ninth Circuit precedent required it to find the existence of a triable issue of material fact so as to preclude a finding of "qualified immunity" on respondents' Fifth Amendment claims. (Pet. App. B3-B4).

Denial of summary judgment on qualified immunity grounds was based on the district court's view that "when *Miranda* measures are ignored, a suspect's Constitutional rights are 'directly affected.' [citation] *A failure to comply with Miranda can be viewed as an aggravation of other coercive tactics.*" (Pet. App. B3, emphasis added) The district court ultimately denied summary judgment because, as Judge Rafeedie stated, "The Court believes this defense [qualified immunity] is foreclosed by the analysis set forth in *Cooper v. Dupnik*, 963 F.2d at 1250-51. (Pet. App. B6).

The only reason the district court believed that a triable issue of material fact existed is because of the over broad and meaningless test developed in *Cooper*.

However, as the dissent in *Cooper v. Dupnik* noted: "A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." (emphasis in original) *Cooper,* 963 F.2d 1220, 1254 (9th Cir. 1992), (citing *Oregon v. Elstad*, 470 U.S. 298, 306 n.1] (Brunetti, J, dissenting). *Cooper*, according to the majority, purports to limit liability "where police officers continue to talk to a suspect after he

asserts his rights and where they do so in a benign way without coercion or tactics that compel him to speak." *Id.* at 1255. "This purported limit is illusory. The main point of the majority opinion seems to be that authorities' deliberate disregard of *Miranda* safeguards – that is, their failure to stop questioning Cooper when he requested a lawyer – lead to the coercion and Cooper's imprisonment in 'a totalitarian nightmare' ... When, then, in the majority's view would such a deliberate disregard of *Miranda* rights not represent 'coercion or tactics that compel him to speak?' " *Id.* at 1255.

III. The Novel Qualified Immunity Issue Presented By This Petition Is Whether Police Detectives Are Entitled To Rely On State Certified Training Or Whether They Are Expected To Form Their Own Judgments About Issues Of Constitutional Law.

Respondents argue that this case presents no novel issue of qualified immunity. Again, they are wrong. They dismiss the petitioners' entitlement to qualified immunity by suggesting that police departments can avoid liability by "simply training their agents to wilfully defy or disregard" clearly established constitutional rights. (Respondents' Opposition 25). This argument begs the question. Instead, this case concerns whether the "contours of the [asserted] right" was "sufficiently clear that a reasonable official would understand that what he [was] doing

violate[d] that right." *Anderson v. Creighton*, 483 U.S. 639 (1978).

Despite respondents' claim that the constitutional right at issue here has been clearly established for "over sixty years" (Respondents' Opposition 25), even today, there is considerable disagreement as to the contours of the Fifth Amendment right. [See Petition at 22-28 discussing conflict in the circuits.][3]

IV. In Order To Avoid Review, Respondents Mischaracterize The Record Which Shows That McNally And Bey Did Not Suffer The Brunt Of Any Unconstitutional Conduct.

A. McNally's Murder Confession Was Not Introduced At Trial And Was Not Considered At His Sentencing And The Admission Of Bey's Statements Was Harmless Error.

As the record clearly shows, McNally's murder confession was excluded *for all purposes*

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[4] Respondents correctly point out that the Second Circuit in *Weaver v. Brenner*, 40 F.3d 527 (2nd Cir. 1994) followed the Ninth Circuit's analysis in *Cooper v. Dupnik*. *Weaver* was decided after the interrogations of both Bey and McNally, and further demonstrates the existence of a conflict in the circuits.

during his criminal trial. However, McNally persists in attempting to create the illusion that his post-invocation statement was used against him, thereby resulting in an alleged violation of his Fifth Amendment rights. During the criminal court sentencing hearing on January 18, 1995, McNally moved to strike portions of the probation report that referred to his inculpatory statements to the police, and asked that a new probation report be prepared without reference to those statements. (ER 133). He also opposed the district attorney's argument that the court should consider McNally's post-invocation murder confession as an aggravating factor of the crime. (ER 133-134). Thus, all the record establishes is that the prosecutor offered the post-invocation murder confession, not that the court used it for purposes of aggravating McNally's sentence. In denying McNally's motion to strike the probation report, the judge stated "The court will only consider those portions which the court feels is admissible[.]" (ER 140).

The record also shows that McNally's sentence was based on the violent nature of the crime, not on the prosecutor's reference to McNally's post-invocation confession. The court stated:

> Now with regard to your factors in mitigation, I don't see one factor in mitigation other than the fact that you made some statements to the police at the outset which were

> excluded by the court in terms of trial. With or without these statements, the evidence is fairly clear that the nature of the offense was such that a murder rather than a manslaughter was committed, but the jury nevertheless, in its view of the evidence, concluded that was a manslaughter. And, the court will have to abide by that finding. [ER146-147].

With regard to Bey's statements, although the criminal trial court admitted his statements for impeachment purposes, the California Court of Appeals properly held that the admission of the evidence was harmless error. The appellate court found the admission of the statements was harmless beyond a reasonable doubt because the record established overwhelming evidence of Bey's guilt. *People v. Bey*, 21 Cal. App. 4th 1623 (1993). Thus, the practical effect was that the statements were never "used" against him.

And even if the statements were "used" at trial, the officers had no control over the prosecutor who sought the admission of the statements, or the judge who ultimately ruled on the admissibility of the statements. It is fundamental that an officer is responsible only for his or her conduct and cannot be held responsible of the acts of others.

B. The District Court Concluded After Hearing The Interrogation Tapes That The Police Conduct Did Not Violate Norms Of Civilized Society.

Despite the impression respondents attempt to create concerning McNally's and Bey's interrogations, there is nothing in the record to support any finding of actual coercion.

As his tape recorded statement establishes, McNally's entire interrogation lasted a little over an hour, and was conducted in a businesslike tone. McNally did not cry or otherwise break down emotionally. Contrary to respondent's claim, no "physically threatening gestures" occurred. (Respondents' Opposition 1).

Bey's interrogation lasted approximately 15 minutes, during normal working hours. Even though Bey characterizes the interrogation as loud and threatening, which the Ninth Circuit improperly adopted, the actual tape recording negates the claim. (ER 292).

CONCLUSION

Police officers must be able to investigate brutal killings in a civilized manner that does not shock the conscience. The detectives here did that, and in fairness, they and other officers should not be exposed to personal liability for the actions of prosecutors and judges at trial. Nor

should they be exposed civilly when they follow their state certified training. The Ninth Circuit's decision should be reviewed to protect the ability of law enforcement officers as individuals to continue protecting all of us.

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Respectfully submitted,

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